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Ronald J. Hedges is the principal of Ronald J. Hedges, LLC. He has extensive experience in e-discovery and in the management of complex litigation and has served as a special master, arbitrator and mediator. Mr. Hedges was a United States Magistrate Judge in the United States District Court for the District of New Jersey from 1986 to 2007. While a magistrate judge, he was the Compliance Judge for the Court Mediation Program, a member of the Lawyers Advisory Committee, and both a member and reporter for the Civil Justice Reform Act Advisory Committee. From 2001 to 2005 he was a member of the Advisory Group of Magistrate Judges. Mr. Hedges was an adjunct professor at Seton Hall University School, where he taught mediation skills (1993-2007). He is currently an adjunct faculty member at Georgetown University Law Center, where he has taught an introduction to electronic discovery and evidence since 2006. He has also been named a Visiting Research Collaborator in the Center for Information Technology of Princeton University for 2010-11 and 2011-12.

Mr. Hedges' publications include *Managing Discovery of Electronic Information; A Pocket Guide for Judges* (co-author) (Federal Judicial Center: 2007), *Discovery of Electronically Stored Information: Surveying the Legal Landscape (*BNA: 2007), *The Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality & Public Access in Civil Cases* (The Sedona Conference: 2007) (editing team member), "Case Management and

E-Discovery: Perfect Together," *DDEE* (July 1, 2009), "Rule 26(f): The Most Important E-Discovery Rule," *New Jersey Law Journal* (May 18, 2009), and "A View from the Bench and the Trenches: A Critical Appraisal of Some Proposed Amendments to the Federal Rules of Civil Procedure," 227 F.R.D. 123 (2005).

Among other things, Mr. Hedges is a member of the American Law Institute, the American Bar Association, and the Federal Bar Association. He is a member of the Board of Directors of the Historical Society and the Lawyers Advisory Committee of the United States District Court for the District of New Jersey. Mr. Hedges is a member of the Sedona Conference Advisory Board, the Sedona Conference Working Group on Protective Orders, Confidentiality, and Public Access, and the Sedona Conference Working Group on Best Practices for Electronic Document Retention & Production. He is also a member of the Law Alumni Board (emeritus) and the advisory board of the Advanced E-Discovery Institute of Georgetown University Law Center.

"COOPERATION" UNDER THE FEDERAL RULES: AN OVERVIEW

By

Ronald J. Hedges

INTRODUCTION. The concept of cooperation underlies the Federal Rules of Civil Procedure. Although cooperation took on new meaning with the so-called "e-discovery" amendments of the Rules effective December 1, 2006, the Rules have long required that parties talk with each other before major litigation events. These requirements, intended to foster the efficient management of civil actions and minimize motion practice, are described in summary form below.

RULE 26(f). This is commonly known as the "meet-and-confer" rule. It requires parties in most categories of civil actions to confer before the Rule 16(b) initial scheduling conference with the Court (Rule 26(f)(1)) and to develop a discovery plan (Rule 26(f)(2)) that addresses, at a minimum, the matters set forth in Rule 26(f)(2) and (3). A number of

district courts have local rules or practices that supplement the matters to be addressed, particularly those involving discovery of electronically stored information ("ESI").

Although Rule 26(f) was expanded to address discovery of ESI in the 2006 amendments, the obligation to meet-and-confer first appeared in 1993 amendments. *See Advisory Committee Note to 1993 Amendment to Rule 26(f).* The Rule was further amended in 2000 to provide that a in-person meeting was not required in all instances: "There are important benefits to face-to-face discussion of the topics to be covered in the conference, and these benefits may be lost if other means of conferring were routinely used when face-to-face meetings would not impose burdens. Nevertheless, geographic conditions in some districts may exact costs far out of proportion to these benefits." *Advisory Committee Note to 2000 Amendment to Rule 26(f).*

Rule 26(c). This Rule addresses protective orders in discovery disputes. Any motion for a protective order must include "a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action." Rule 26(c)(1).This language was added in 1993: "The revision requires that ... the movant must confer—either in person or

by telephone—with the other affected parties in a good faith effort to resolve the discovery dispute without court intervention. If the movant is unable to get opposing parties even to discuss the matter, the efforts in attempting to arrange such a conference should be indicated in the certificate." *Advisory Committee Note to 1993 Amendment to Rule 26(c).*

Rule 37(a). This Rule is a counterpart to Rule 26(c). Rule 37(a)(1) requires that, when a motion to compel Rule 26(a) disclosures or discovery is made, the moving party must include a certification that it has "in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action." This language was also added in 1993. *See Advisory Committee Note to 1993 Amendment to Rule 37(a).*

Conclusion. The Rules have long required parties to confer before three major litigation events: (1) Submission of a discovery plan, (2) motion practice for protective orders, and (3) motion practice for orders compelling discovery. Parties must confer to enable active case management along lines suggested by the parties themselves and to minimize or

eliminate sometimes disruptive motion practice. This duty to confer will be considered in this program.

(For a broader discussion of cooperation in civil litigation, *see The Sedona Conference Cooperation Proclamation,* available at www.thesedonaconference.org)

(rev. July 2011)

"PROPORTIONALITY" UNDER THE FEDERAL RULES: AN OVERVIEW

By

Ronald J. Hedges

INTRODUCTION. The concept of proportionality underlies the Federal Rules of Civil Procedure ("Rules"). Proportionality may be explicit in some of the Rules, but is implied throughout. Proportionality addresses litigation conduct, including making and responding to discovery requests, ethical behavior, and the award of sanctions. This short paper will look at the Rules.

RULE 1. Rule 1 provides that the Rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." The words, "and administered," were added in 1993. The revision was intended to, "recognize the affirmative duty of the court to exercise the authority conferred by these rules to ensure that civil litigation is resolved not only fairly, but also without undue cost or delay. *As officers of the court, attorneys share this responsibility with the judge to whom the case is*

assigned." Advisory Committee Note to 1993 Amendment to Rule 1 (emphasis added). Rule 1 thus imposes an obligation on the Bench and the Bar to take affirmative steps to resolve litigation in a "proportional" manner, taking into consideration fairness and costs.

RULE 26(b)(1). This Rule establishes the scope of discovery in federal civil litigation. In a sense, it bifurcates discovery. First, "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." Second, for good cause shown, "the court may order discovery of any matter relevant to the subject matter involved in the action." That bifurcation is an invitation to courts and attorneys to strive for proportionality in discovery by limiting the subjects of discovery. However, under either standard, Rule 26(b)(1) explicitly recognizes proportionality: "All discovery is subject to the limitations imposed by Rule 26(b)(2)(C)." Rule 26(b)(2)(C) is the "proportionality rule."

RULE 26(b)(2)(B). This Rule, adopted as part of the electronic discovery amendments in 2006, again makes explicit reference to the proportionality rule. Rule 26(b)(2)(B), building on the *Zubulake* decisions, established the concept of "not reasonably accessible" sources of electronically stored

information or "ESI." In the first instance, discovery may not be had from sources of ESI that are not reasonably accessible "because of undue burden or cost." However, assuming that undue burden or cost is shown, "the court may nevertheless order discovery from such sources if the requesting party shows good cause, *considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery."* (emphasis added).

Again, proportionality operates on several levels in this Rule. First, considerations of cost and delay make certain sources of ESI presumptively not subject to discovery, thus conserving party resources. Second, if a court finds good cause to allow discovery from such sources, the court looks to the proportionality rule to determine what discovery should be had and under what conditions.

RULE 26(b)(2)(C). This is the proportionality rule. Unfortunately, as has been observed on more than one occasion, it may be the *most* underutilized of the Rules: "The Committee has been told repeatedly that courts have not implemented these limitations with the vigor that was contemplated." *GAP Report to 2000 Amendment to Rule 26(b)(1).* Presumably, as the Bench and the Bar confronts issues of, among other things, the volume and complexity of

electronic discovery, the Rule will be featured more often in arguments and rulings.

Rule 26(b)(2)(C) provides that, on a party's motion or *on its own initiative,* "the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines" that one or more of three conditions are met. These conditions are:

"the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive." Rule 26(b)(2)(C)(i).

"the party seeking discovery has had ample opportunity to obtain the information by discovery in the action." Rule 26(b)(2)(C)(ii).

"the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the party's resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues." Rule 26(b)(2)(C)(iii).

Each of these conditions calls for some analysis of proportionality.

Rule 26(c). Rule 26(c) addresses protective orders. Again, in a sense, it addresses proportionality at several levels. First, the Rule provides that no motion may be made unless the moving party certifies that it has "in good faith conferred or attempted to confer with other affected parties to resolve the dispute without court action." Rule 26(c) thus attempts to conserve the resources of the parties and the courts and further the goals of Rule 1.

Assuming a motion is made, Rule 26(c) provides that, "[t]he court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Among other things, Rule 26(c) orders may, for example, bar Rule 26(a)(1) disclosures or discovery, specify the time and place of discovery, and forbid discovery into certain matters. Rule 26(c) thus affords considerable discretion to judges to, in effect, impose proportionality on parties.

Rule 26(g). Rule 26(g) is the discovery counterpart of Rule 11, both of which address the effect of attorneys' signatures. Rule 26(g)(1) provides that every disclosure, "and every discovery request, response, or objection must be signed by at least one attorney of record... ." Moreover, "[b]y signing, an attorney ... certifies that to the best of the person's

knowledge, information, and belief formed after a reasonable inquiry" certain implied representations are correct. One of these representations is that discovery requests, responses, or objections are "neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action." Rule 26(g)(B)(iii).

The 1983 Advisory Committee Note explains the purpose of this Rule. It "imposes an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37." Moreover, Rule 26(g) "is designed to curb discovery abuse by explicitly encouraging the imposition of sanctions." It provides "a deterrent to both excessive discovery and evasion by imposing a certification requirement that obliges each attorney to stop and think about the legitimacy of a discovery request, a response thereto, or an objection." *Advisory Committee Note to 1983 Amendment to Rule 26(g).*

As with the Rules described here, Rule 26(g) addresses proportionality on several levels. First, it is self-executing: it requires an attorney to "stop and think" before engaging in an act related to discovery and affixing his signature to a document. Second, it empowers courts to address whether

discovery requests, responses, or objections are intended to increase cost and delay or are unreasonably burdensome or expensive, taking into account factors similar to those described in the proportionality rule. *Mancia* v. Mayflower*Textile Servs. Co.*, 253 F.R.D. 354 (D. Md. 2008), demonstrates the potential utility of Rule 26(g) to achieve proportionality.

Conclusion. The Rules encourage proportionality considerations by both the Bench and the Bar. How these considerations are applied in practice will be considered at this program.

(For a broader discussion of proportionality in civil litigation, *see The Sedona Conference® Commentary on Proportionality in Electronic Discovery,* available at www.thesedonaconference.org)

(rev. July 2011)

ETHICAL ISSUES FOR ATTORNEYS IN ELECTRONIC DISCOVERY

By

Ronald J. Hedges©

INTRODUCTION

How does one begin to write about ethical issues for attorneys with regard to electronic discovery ("e-discovery")? Actually, where to begin is rather simple and can be summarized in one word: competence.

The Federal Rules of Civil Procedure ("Rule" or "Rules") and the Model Rules of Professional Conduct ("RPC") provide the basis for ethical conduct in litigation in federal courts. At least in theory, these drive litigation toward trial. However, civil trials are increasingly rare across the United States District Courts and ethical issues often are played out in the context of discovery as the precursor to settlement or summary disposition.

THE RULES

Which Rules might implicate ethical obligations? Rule 1 is a good place to begin: Declaratory in nature, it provides that the Rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." Rule 1 imposes obligations on judges and attorneys to avoid undue delay and cost, factors often cited as being "left behind" in e-discovery.

Rule 26(f), the "meet-and-confer" rule, also comes into play. Rule 26(f) requires, in most civil actions, that parties confer before the commencement of discovery and an analogous Rule 16(b) conference with the court, and discuss a number of issues, including "preserving electronic information" (Rule 26(f)(2)), "disclosure or discovery of electronically stored information, including the form or forms in which it should be produced" (Rule 26(b)(f)(3)(C)), and "claims of privilege or of protection of protection as trial-preparation materials" (Rule 26(f)(3)(D)). At the least, Rule 26(f) requires good faith discussion between adversaries on issues that implicate e-discovery.

Rule 26(b)(2)(C) is the "proportionality" rule. Although directed toward the issuance of orders, Rule 26(b)(2)(C) speaks of the obligations of attorneys to, among other things, avoid discovery that is "unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive." Rule 26(b)(2)(C)(i). Again, this Rule reflects obligations of attorneys to act reasonably and to work in good faith with adversaries.

Indeed, whenever a discovery-related motion is made, the moving party must certify that the parties have conferred in a good faith attempt to avoid the need for the motion. Rules 26(c)(1), 37(a)(1).

Finally, look to the *explicit* obligations imposed on attorneys by Rule 26(g)(1) whenever a Rule 26(a)(1) disclosure is made or a discovery request, response, or objection is made. As to the latter, an attorney's signature is deemed to be a certification that the attorney has not acted in any manner that would warrant the issuance of an order under Rule 26(b)(2)(C). Rule 26(g)(1)(B)(i-iii).

THE RPCs

RPC 1.1 provides that, "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Clearly, with the pervasiveness of electronically stored information ("ESI") in our society, one would be hard-pressed to argue that "competence" does not require attorneys to familiarize themselves with their clients' ESI to at least some degree and be prepared to understand how to request, produce, and use ESI in litigation, including what should be done by an attorney when an adversary offers to forego *any* discovery of ESI.

Familiarity with electronic discovery is, indeed, presumed today. As noted above, Rule 26(f) requires attorneys to discuss subjects directly

related to ESI, including preservation, form or forms of production, and protection of attorney-client privilege and work-product protection (as do a number of local rules, which might require discussion of more subjects and in greater detail). No attorney can afford to participate in any *meaningful* meet-and-confer without knowledge of e-discovery.

THE DUTY OF COMPETENCE

What can go wrong, even when an attorney attempts in good faith to confer with her adversary and reach agreement, for example, on a search protocol? *In re Fannie Mae Securities Litigation,* 552 F.3d 814 (D.C. Cir. 2009), provides a good example. In *Fannie Mae,* a government oversight agency had been subpoenaed to produce certain ESI. After various proceedings, the agency agreed with the party that issued the subpoena to produce documents from backup tapes and to use search terms provided by the party, which led to the identification of some 660,000 documents. In its attempt to comply with a production deadline imposed by the court, the agency retained 50 contract attorneys, expended over 9% of its annual budget, and still could not comply on time. The court found that the agency's efforts were "not only legally insufficient, but too little too late," and held the agency in contempt. That contempt was affirmed on appeal.

Where does competence enter into this sad story? It appears that the agency's attorneys had an inadequate grasp of what the agency had agreed to do and whether the agency was capable of meeting the

deadline on time. Competence requires comprehension of the cost, time, and burden of what one has agreed to do and knowledge of whether it can be accomplished by an agreed-on deadline.

Competence aside, the Model Rules also require attorneys to act in a certain manner in proceedings. RPC 3.4(d) provides that, "in pretrial procedure, [an attorney may not] make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party." This ethical prohibition is itself reflected in Rule 26(g)(1)(B)(iii), which requires an attorney to certify that any discovery request or response is "neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action." New life was breathed into this rule by *Mancia v.Mayflower Textile Serv. Co.,* 253 F.R.D. 354 (D. Md. 2008), in which the court cautioned that cooperation among adversary counsel is a professional obligation. *See,* with regard to cooperation, *The Sedona Cooperation Proclamation,* available at *thesedonaconference.org.*

Ethical issues may also arise in the context of the search for ESI. For example, does an attorney have an obligation to "educate" an adversary who is unfamiliar with e-discovery or who proposes inadequate search terms? Should an attorney advise her adversary if the adversary's proposed search terms would "miss" plainly relevant ESI? What, if anything, should an attorney do if agreed-on search terms fail to capture what the attorney knows to be a document harmful to her case? How far should an attorney go in educating her adversary about the electronic systems of her client?

THE TRANSMISSION AND RECEIPT OF ESI

Ethical obligations may also emerge from the receipt of ESI. This article will not delve into problems that can arise from the transmission of ESI outside of the context of litigation. For example, the ethics rules of various jurisdictions hold that it is unethical for a receiving attorney to "mine" ESI for hidden information. Because jurisdictions vary on whether mining is unethical, it is important to research the ethical rules applicable to a particular jurisdiction. For a compilation of ethics opinion from the States, *see, e.g.*, *"Metadata Ethics Opinions Around the U.S.*, ABA Legal Tech. Resource Ctr., available at www.**americanbar.org**/.../charts_fyis/ (last visited Mar. 27, 2011).

Similarly, ethical duties may be imposed on an attorney to advise an adversary if the latter inadvertently produces privileged information in the context of litigation. In the United States courts, Rule 26(b)(5)(B) imposes certain obligations on the *receiving* attorney when his adversary advises that there has been an inadvertent production of privileged material. Underlying all these considerations, of course, is RPC 1.6(a), which states that, "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent ... ." A related issue is what steps an attorney must take to retrieve all "copies" of ESI that his adversary inadvertently produced and which the attorney has distributed by electronic means. *See* M.R. Grossman & R.J.

Hedges, *"Do the Federal Rules Provide for Clawless 'Clawbacks?'"* 9 *Digital Discovery & e-Evidence* 1 (BNA: Sept. 1, 2009).

Waiver of attorney-client privilege and work-product is addressed by Federal Rule of Evidence ("Evidence Rule") 502. This rule establishes a uniform test in the federal courts to address privilege issues. Rather than review the rule here, suffice it to say that Evidence Rule 502 was enacted in an attempt to, among other things, address the volume of ESI produced in the typical litigation and the cost of pre-production privilege review. These volume and cost issues lead to a number of questions, including (1) what role automated searches should play in privilege review, (2) what agreements, if any, should be reached with adversaries about privilege review and inadvertent production, (3) what "informed consent" of the client means in this context, and (4) what the consequences of inadvertent production in one action may be in another action in which the producing party is involved.

A CASE STUDY ON AUTOMATED SEARCH AN INADVERTENT DISCLOSURE.

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Datel Holdings Ltd. v. Microsoft Corp., 2011 WL 866993 (N.D. Ca. Mar. 11, 2011), serves as a useful tool to think about automated

search and "reasonableness" under Evidence Rule 502. At issue in this intellectual property dispute were six documents that were inadvertently produced by the defendant. Five of the six were part of an email chain that omitted a "parent" or original email request for legal advice that resulted in the chain. The sixth was an email that contained some of the other five and included the request. The defendant became aware of the inadvertent production during a deposition, at which time attorney-client privilege and work-product protection was asserted.

Applying Evidence Rule 502(b), the court found that there had *not* been a waiver. First, the production was inadvertent: "although Defendant's team of lawyers carefully reviewed documents …, a computer glitch truncated the documents, removing the portion conveying the request from counsel to conduct a factual investigation. The technical glitch was a mistake, which occurred accidentally and unintentionally, and prevented Defendant's team of lawyers from recognizing the privileged nature of the email chain." Second, the defendant took reasonable steps to prevent disclosure, "adopting fairly robust measures." These included use of an initial screening team, a quality control team, and a privilege team that was trained and whose work was subject to quality control. The court rejected the argument that, "[i]nadvertent production of a relatively low proportion of documents in a large production under a short timetable" was evidence

of unreasonableness (the defendant clawed back or asked for the return of some 221 documents out of over 119,000). The defendant had used a computerized processing system which suffered the then-unknown software failure, again demonstrating reasonableness. Moreover, "given the scope of production and the unexpected nature of the software glitch, the fact that the format of the deposition documents gave some indication that some content had been truncated was not a sufficiently obvious clue that any missing material contained privileged material, so no obligation of post-production review was triggered prior to the deposition." Third, the defendant took reasonable steps to rectify the error: It interrupted the deposition to assert privilege and then undertook a review of the production.

Turning to the merits, the court found that only the "parent" in the chain was protected by the attorney-client privilege and that the remainder of the chain was not protected by work product.

CASE STUDIES ON INADVERTENT DISCLOSURE AND ATTORNEY MISCONDUCT

Various decisions address inadvertent disclosure. *Jeanes-Kemp, LLC v. Johnson Controls, Inc.*, 2010 WL 3522028 (S.D. Miss. Sept. 1, 2010), is worthy of note because it looks at the interplay of Rule 26(b)(5)(B), Evidence Rule 502(b), and ethical duties. The plaintiff produced a computer disk containing scanned copies of 1,271 documents. Three attorneys reviewed the documents before production. After production, defense counsel asked whether the plaintiff intended to produce *two* documents between the plaintiff and prior counsel. The plaintiff responded that the production was inadvertent and requested that the documents be deleted and copies destroyed or returned. Defense counsel segregated the documents but also asked the plaintiff to take a dismissal and threatened to use the documents at depositions. The plaintiff moved for a protective order, to disqualify defense counsel, and for sanctions. Citing Rule 26(b)(5)(B), Evidence Rule 502(b), and a Fifth Circuit decision from 1993, the court found that the plaintiff had taken reasonable steps to prevent disclosure and that there had not been a waiver.

The court denied the disqualification motion: "The documents ... were procured not by defense counsel's misdeeds, but by a mistake committed by Plaintiff's counsel." On the sanctions motion, the court found that defense counsel's use or threatened use of the documents "flirted with, even if it did not in fact cross, the line of defense counsel's ethical obligations." The court barred the defendant from making any use of the documents or sharing the documents with others.

Castellano v. Winthrop, 27 So.3d 134 (Fla. Dist. Ct. App. 2010), is an example of attorney behavior that goes beyond inadvertence. Here,

the appellate court declined to review an order disqualifying the petitioner's counsel in protracted litigation over the custody and care of a child. The petitioner had "illegally obtained" the respondent's USB flash drive and then retained counsel, who received, reviewed, and used the contents of the drive, which included privileged material and work product. Faced with a demand to return the drive, counsel filed its contents with the court and turned the drive over to law enforcement. The appellate court held that, regardless of ancillary relief afforded by the trial judge, disqualification was appropriate as the petitioner had obtained an unfair informational and tactical advantage. The appellate court also reminded "other attorneys facing a similar dilemma" of an ethical obligation to act in a certain manner on receipt of confidential materials the attorney knew or should have known had been wrongly obtained.

CONCLUSION

A *competent* attorney must consider ethical issues in e-discovery through a prism of ethical obligations, rules, and precedent. There may not always be an easy answer to every question but, hopefully, this article has highlighted some of the ethical issues that an attorney could confront in e-discovery or otherwise in the transmission or receipt of ESI.

PRIVATE INFORMATION, DATA BREACH, AND THE FIRST AMENDMENT

By

Ronald J. Hedges

Imagine that a bank erroneously sends confidential information about 1,325 customers to an email account other that the one it intended to. The holder of the account to which the information is erroneously sent does not respond to the bank's request for the "return" of the information. The Internet Service Provider ("ISP") of the account refuses to assist the bank in identifying the account holder or securing the return.

What's the bank to do? If the bank was Rocky Mountain Bank it filed a civil action for a temporary restraining order ("TRO") and injunctive relief against Google, Inc., the ISP. *Rocky Mountain Bank v. Google Inc.*, Case No. 5:09-CV-04385 (N.D. Ca.). The issues raised here arise from the nature of the TRO secured by the bank:

(1) Google and the Gmail Account holder are temporarily enjoined from accessing, using, or distributing the Confidential Customer Information;

(2) Google shall immediately deactivate the Gmail Account;

(3) Google shall immediately disclose to Plaintiff and the Court the status of the Gmail Account, specifically, whether the Gmail Account is dormant or active, whether the Inadvertent Email was opened or otherwise manipulated, and in the event that the Gmail Account is not dormant, the identity and contact information for the Gmail Account holder.

After the bank secured the TRO, and prior to argument on the bank's motion for a preliminary injunction, the bank and Google entered a settlement (the terms of which are unknown) and stipulated to a dismissal with prejudice and the vacating of the TRO. A dismissal order followed.

These facts raise an obvious issue. Assume that the account holder was the innocent recipient of the confidential information (which appears to have been the case). Assume further that the account holder was not a party to the litigation (which he or she or it was not). Nevertheless, the account holder's ability to use the account was interrupted without any showing of fault or wrongful conduct.

Presumably, *Fed. R. Civ. P.* 65(d) was inapplicable, as the TRO bound Google and not the account holder—what rights did the account holder have? What right *should* the account holder have had?

Leaving those fascinating questions, other facts directly implicate the First Amendment. Initially, the bank sought to file all pleading and other filings under seal. The bank argued that its customers would learn of the error and would "unnecessarily cause panic ... and result in a surge of inquiry from its customers." The court refused to grant the relief sought (but allowed the account holder's email address to be redacted): "An attempt ... to shield information about an unauthorized disclosure ... until it can be determined whether or not that information has been further disclosed and/or misused does not constitute a compelling reason that override's the public common law right of access to court filings." However, Google's report on its compliance with the TRO (which included personal information on the account holder) was "lodged" with the court under seal.

After the action had been dismissed a media organization, Mediapost Communications, moved to intervene and sought access to the Google report. Google

objected, contending that the privacy interest of the innocent account holder outweighed any public interest in disclosure. The court did not reach the merits but, instead, dismissed on the ground that the motion was untimely. Mediapost moved for reconsideration. Although the court rejected Mediapost's reliance on case law about access to materials *filed* rather those *lodged* under local practice, the court granted reconsideration on December 16, 2009 to address, "whether a third party may intervene in a closed action to require public disclosure of a document lodged with the Court, and not filed, pursuant to an order that was vacated prior to the motion for intervention." On January 27, 2010, the court allowed intervention and, on the merits, denied the motion to unseal. In so doing, the court recognized a fundamental distinction between lodging and filing. Mediapost filed a notice of appeal on February 26, 2010.

What might have been made of this "media" development? First, the court focused on the purported distinction between lodging and sealing. This raised a direct First Amendment question. Second, the court did not address the privacy interest (if any) of the "innocent" as against the public interest in disclosure.

Mediapost appealed. The Court of Appeals reversed and remanded. *Rocky Mountain Bank v. Google, Inc.*, 2011 WL 1453832 (9th Cir. Apr. 15, 2011).

The court began by restating the existing law: "The usual rule regarding judicial records and documents is that there is a strong presumption that the public is entitled to access. *** Like most presumptions, this one does not delineate an absolute right, but to overcome it a compelling reason to deny access must be shown. *** Some exceptions to that general rule are instances where access is sought to grand jury transcripts, or to warrant materials while a pre-indictment investigation is in progress, or to materials which were filed or produced pursuant to a protective order" (footnotes omitted).

The Court of Appeals did acknowledge that, "there are some distinctions between filed and lodged documents." Nevertheless, "the public's long-standing right [to access] cannot be absterged by the simple expedient of having documents lodged. Here, for example, the report in question is a quintessential judicial document." The Court of Appeals remanded for further proceedings that would address whether redaction or sealing might be appropriate.

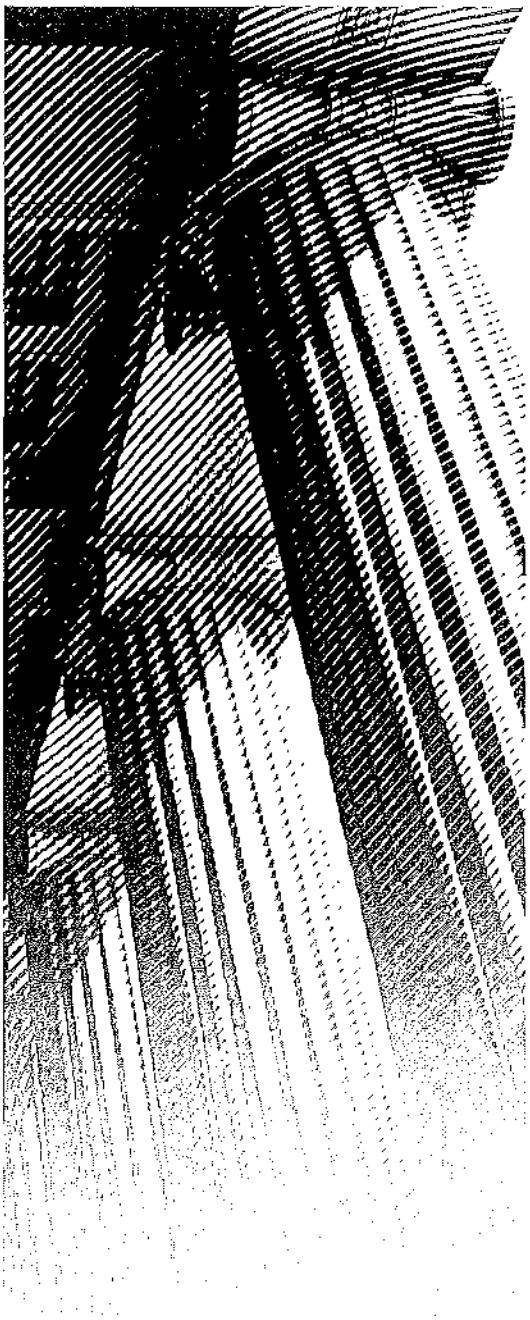
Rocky Mountain Bank affirms the long-standing right of public access to materials submitted to a court as well as the need to make specific determinations that could overcome that right. Plainly, this affirmation recognizes the difficulties that courts face in balancing the rights of parties, nonparties, and the press.

May 11, 2011

The Information Governance Maturity Model:

A Foundation for Responding to Litigation

Ronald J. Hedges



The relationship between an organization's information-handling practices and the impact those practices have on its ability to respond to electronic discovery is recognized in the Electronic Discovery Reference Model (EDRM). But the EDRM falls short of describing standards or best practices that can be applied to the complex issues surrounding the creation, management, and governance of electronic information. ARMA International's Generally Accepted Recordkeeping Principles® and its Information Governance Maturity Model are designed specifically to provide a scalable, broadly applicable framework to address these issues.

The Information Governance Maturity Model (the Model) offers an approach to records management that may be of assistance to any organization, private or public, in protecting itself in the use of information assets, complying with applicable legislative and regulatory mandates, and designing and implementing effective records management programs. It focuses on the internal needs of organizations, including their obligation to respond to government investigations and to engage (or be engaged) in litigation. This white paper looks to the Model in the context of both investigations and litigation.

An Overview of Government Investigations

For many organizations, government investigations are a fact of life. The statutory and regulatory net is wide and, depending on the nature of an organization, there may be multiple investigations at one time.

The reader should think of a spectrum in the context of investigations. Organizations in heavily regulated industries (such as energy and pharmaceutical) are routinely subject to government oversight and inquiry. At the other end of the spectrum may be organizations that do not routinely draw the attention of elected officials, regulators, or law enforcement. Even at this end, however, inquiries into workplace safety or employment practices should not be unexpected.

What investigations have in common are their potential broad sweep and the lack of judicial intervention to limit any such sweep. For example, in *FTC v. Church & Dwight Co.*, 2010 WL 4783998 (D.D.C. Oct. 29, 2010), the court enforced a subpoena and civil investigative demand that called for the production of documents and electronically stored information (ESI) from a Canadian subsidiary of Church & Dwight Co. related to an antitrust investigation of a domestic market. In doing so, the court recognized the broad scope of authority conferred on the Federal Trade Commission and found that the information sought was of "reasonable relevance" to the investigation. Nothing more was needed.

For another example of the broad deference given to government agencies, look to *In re Subpoenas*, 2010 WL 841258 (W.D. Va. Mar. 10, 2010), in which the court found investigative subpoenas into possible federal violations arising out of the marketing of a drug and for related health fraud to be "reasonable" under the Fourth Amendment as the information sought was relevant to the investigation.

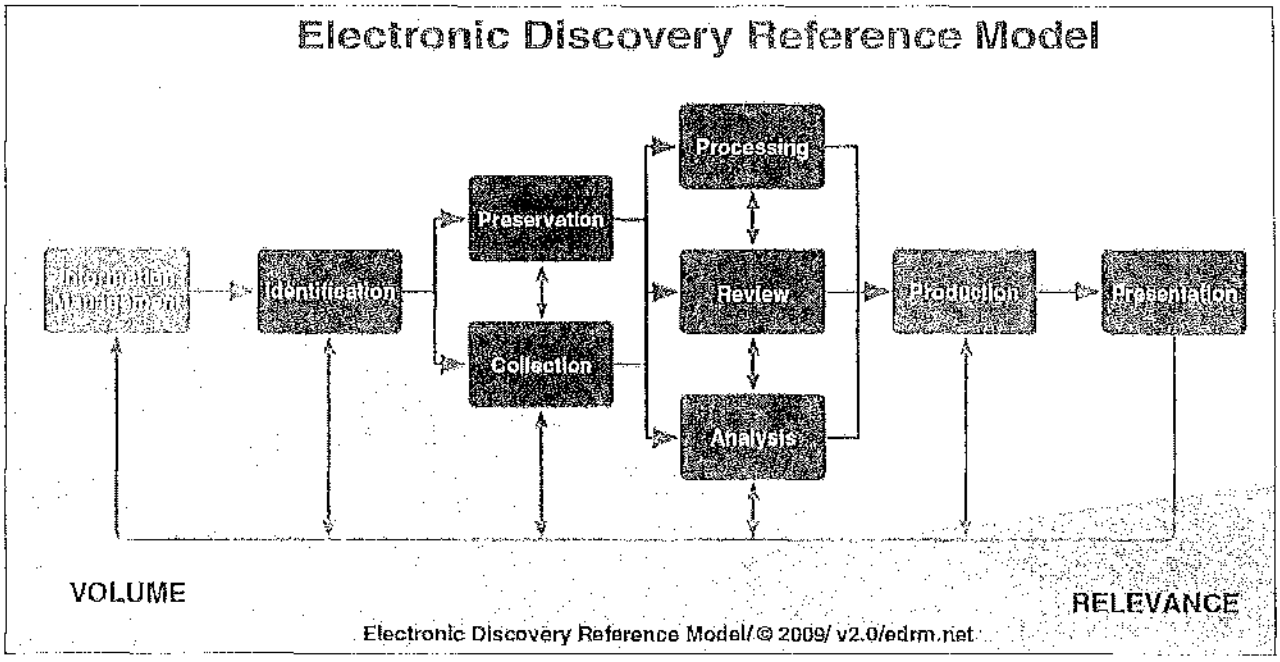
Government investigations can require the production of large volumes of information – in the form of paper or ESI – and courts are unlikely to intervene in favor of an organization under investigation. The Model provides a process that may help an organization organize its information assets and respond to investigatory demands.

An Overview of Litigation

An organization must foresee participation in litigation, be it as a plaintiff, a defendant, or a nonparty subject to a subpoena. Litigation, so defined, may be rare or frequent. Nevertheless, we live in a litigious society. The Model, once again, provides a means by which an organization can respond to the imperatives of litigation, be it pending or reasonably anticipated.

To understand those imperatives, think again of a spectrum, illustrated for the purposes of this white paper by the Electronic Discovery Reference Model (EDRM) shown below.

The EDRM recognizes the spectrum of information management in the context of litigation. Before litigation, an organization maintains information to comply with laws or regulations and to meet its business needs. We can define these as "records." This is



Source: EDRM (*edrm.net*)

where records management begins in the classic sense. An organization can -- and should -- create, implement, and evaluate records retention policies pursuant to which records are kept and, when appropriate, destroyed.

When litigation begins or is reasonably foreseeable, a duty arises to preserve "relevant information," which goes beyond what the organization treats as "records" to encompass all media on which relevant information may be recorded, from the most formal report to the board of directors to the most informal and transitory text message. If the information is relevant to the subject matter of the dispute, broadly defined, it becomes subject to a litigation hold. This hold is imposed by law and requires an organization to preserve information that it might otherwise routinely destroy.

Again, what is "relevant" is generally broadly defined, at least before adversary parties agree on narrowing the scope of what must be preserved or a party seeks judicial intervention to narrow the scope. As we will see, failure to comply with a litigation hold can, under certain circumstances, have severe consequences. Simply put, the loss of information subject to a hold is called *spoliation*.

After information is preserved, it must be reviewed, the information may be subject to disclosure and discovery by other parties, and, at some point, the information may need to be admitted into evidence. The FRDM recognizes the spectrum, as does the "Flow of Litigation" chart on page 4.

Note, again, the theme of a spectrum: The litigation hold may be "triggered" at different times for different parties, but the hold runs throughout the course of a given litigation and across various events that may occur before litigation is commenced and even after litigation is concluded.

Any response to actual or threatened litigation begins with a records retention policy, assuming it exists. Once there is a trigger, an organization imposes a preliminary hold, begins to preserve, and identifies sources (or repositories) of information that must be preserved. Note that there are two constants that run through litigation:

1. Preservation of information subject to the hold
2. An ongoing review and refinement of the hold, as well as the periodic reissuance of litigation hold notices

Nothing is necessarily static with regard to the scope of preservation but, instead, parties should confer with regard to scope and, if necessary, seek judicial assistance.

When litigation begins or is reasonably foreseeable, a duty arises to preserve "relevant information," which goes beyond what the organization treats as "records" to encompass all media on which relevant information may be recorded ...

Preservation, of course, is not to be seen in isolation. Once information is preserved, the information must be reviewed to determine if it is in fact relevant and, if so, whether the information may be withheld from disclosure to other parties by reason of, for example, confidentiality or privilege.

After this review, and perhaps subject to a protective order under Rule 26(c) of the Federal Rules of Civil Procedure (FRCP) or a nonwaiver agreement or order under Rule 502(d) or (e) of the Federal Rules of Evidence, the information should be disclosed in discovery and, perhaps, introduced into evidence.

The "Flow of Litigation" chart offers a concise overview of the various stages of a civil action in U.S. courts. Remember, this is just an overview and that events—and costs—may vary on an action-by-action basis.

Note also that there should come a point when the duty to preserve ceases and an organization's records retention policies again control the destruction of information.

What can go wrong when an organization finds itself in litigation? One leading judicial decision that offers a variety of errors that can occur at the earliest stage, that of the establishment and implementation of a legal hold, is *Pension Committee of the University of Montreal Pension Plan v. Banc of America v Securities LLC*, 685 F. Supp. 2d 456 (S.D.N.Y. 2010). This lengthy decision, authored by United States District Judge Shira A. Scheindlin, gives numerous examples of actions by a number of plaintiffs that led to the loss of relevant information, including:

- The failure to issue a written litigation hold
- The failure to stop the routine deletion of information after a hold was issued
- The failure to secure information from "key players" (employees having information subject to the duty to preserve)
- The failure of management to supervise when delegating search efforts to others.

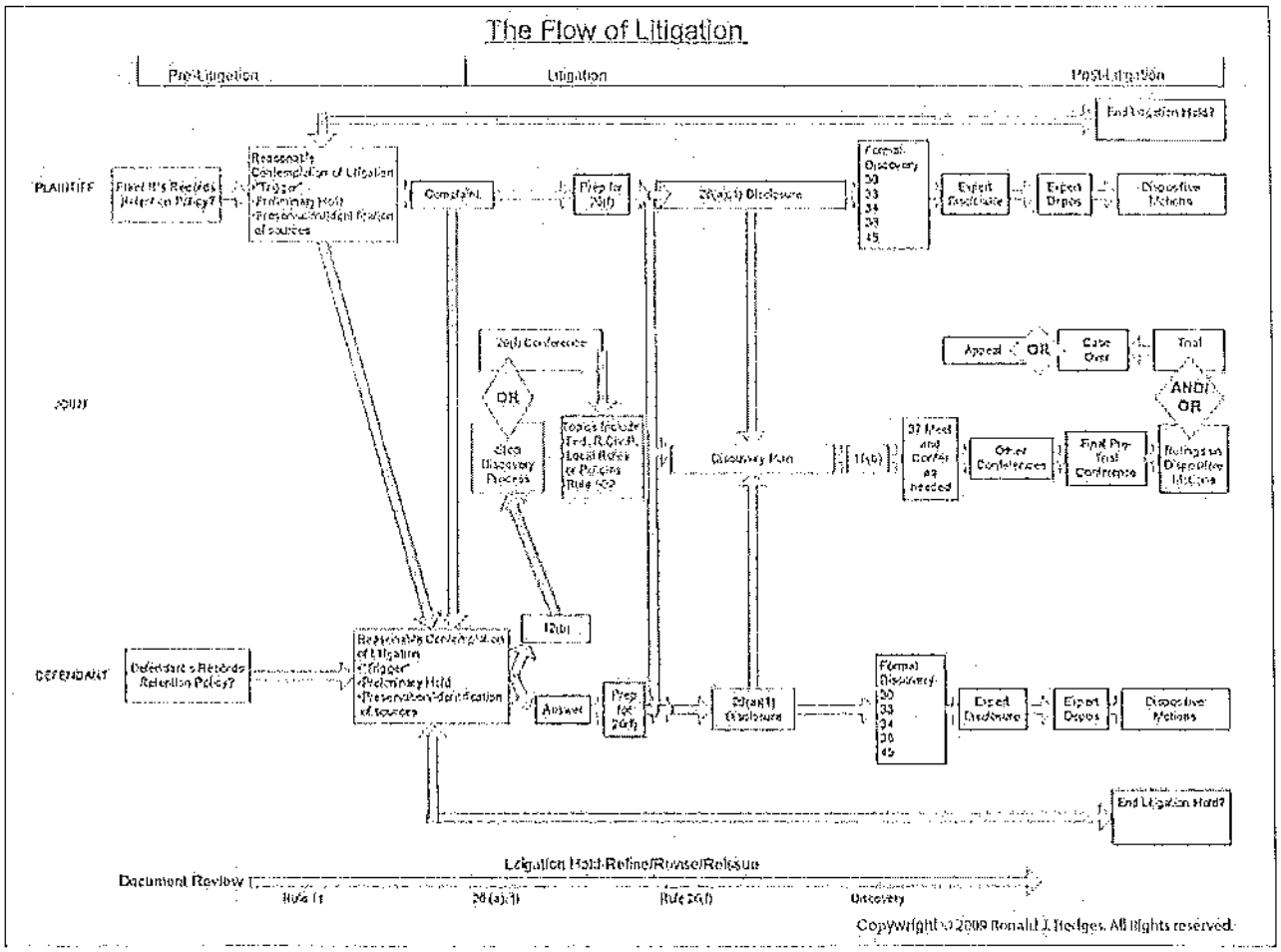
Scheindlin analyzed each failure within a framework of whether the failure was the result of gross negligence, negligence, or willful misconduct and imposed appropriate sanctions, including spoliation sanctions, which alter the ordinary burden of proof in litigation and allow juries to presume missing facts or make adverse inferences.

Decisions that cite to and follow *Pension Committee* include *Crown Castle USA Inc. v. Fred A. Nunn Corp.*, 2010 WL 4027780 (W.D.N.Y. Oct. 14, 2010), in which a duty to preserve had been triggered when employees discussed possible insurance claims and an in-house attorney labeled communications as being subject to attorney-client privilege or work product protection.

For a decision that questions the need for a written hold notice in every instance (suggested by *Pension Committee* to be a grossly negligent act), see *Orbit One Communications, Inc. v. Numerex Corp.*, 2010 WL 4615547 (S.D.N.Y. Oct. 26, 2010). The point here is that reading *Pension Committee* and other judicial decisions can lead to the development of best practices that benefit, rather than harm, organizations.

The reader should be aware that the standards for spoliation vary in different jurisdictions (federal and state) across the nation. For examples of these variations, see *Victor Stanley, Inc. v. Creative Pipe Inc.*, 2010 U.S. Dist. LEXIS (D. Md. Sept. 9, 2010), affirmed and rejected in part, Civil Action No. MJG-06-2662 (D. Md. Nov. 1, 2010) and *Rimkus Consulting Grp. v. Cammarata*, 688 F. Supp. 2d 598 (S.D. Tex. 2010).

The reader should also think of sanctions for spoliation in the context of a trilogy



Source: Ronald J. Hedges. Used with Permission.

of the scienter (or state of mind) of the spoliator, relevance of the information destroyed or lost, and prejudice to the party that was deprived of the information.

Mere negligence, without a demonstration that the missing information was relevant or harmed the ability of the requesting party to conduct the litigation, will seldom result in more than a slap on the wrist.

The more egregious the conduct, however, the more likely the court will allow a jury to presume that the missing evidence was relevant and that its loss prejudiced the requesting party.

But in most circumstances, all three elements – a culpable state of mind, relevance of the missing information, and prejudice to the requesting party – must be proven for a severe sanction, such as default judgment or dismissal of the action, to be imposed.

The duty to preserve can also have a wide sweep. For example, a party may be deemed to have "possession, custody, or control" under Rule 34(a) of the FRCP over information held by another entity by reason of contract. Thus, the party may be required to take steps to preserve and produce that information.[1] See, for example, *Goodman v. Praxair Serv.*, 632 F. Supp. 2d 494 (D. Md. 2009) and *Innis Arden Golf Club v. Pitney Bowes, Inc.*, 629 F. Supp. 2d 175 (D. Colo. 2009), two judicial decisions that reached different conclusions over a party's "control" of a consultant under the facts presented.

As *Pension Committee* and numerous other decisions illustrate, preservation has its pitfalls. This white paper now returns to the Model and suggests how those pitfalls may be avoided or, at the least, minimized in an organization's management of whatever "records" may be defined to be.

Applying the Model to Litigation and Investigations

The Model speaks of Generally Accepted Recordkeeping Principles® and, in each, establishes levels that an organization may aspire to and reach.[2] (See page 7 for a

[1] Organizations that use web-based services to create or store information (e-mail, for example) must consider the legal risks this presents in terms of their ability to locate, segregate, maintain integrity of, and access that information. For guidance, see *Guideline for Outsourcing Records Storage to the Cloud*. Overland Park, Kansas: ARMA International, 2010.

[2] Visit *www.arma.org/legal* to see the full GARP® Information Governance Maturity Model.

full description of the principles.) The principles are:

- Accountability
- Transparency
- Integrity
- Protection
- Compliance
- Availability
- Retention
- Disposition

Within each principle are the levels. These are:

- Level 1 (Sub-Standard)
- Level 2 (In Development)
- Level 3 (Essential)
- Level 4 (Proactive)
- Level 5 (Transformational)

This white paper will use, as an example, the first principle and "fit" the possible levels of that principle into the investigations and litigation frameworks described above.

The Principle of Compliance

The Principle of Compliance states that, "[t]he recordkeeping program shall be constructed to comply with applicable laws and other binding authorities, as well as the organization's policies."

Level 1 – Sub-Standard

Level 1 is where, among other things, there is "no clear definition of the records the organization is obligated to keep" and "no central oversight and no consistently defensible position." Plainly, this level is a recipe for disaster for any organization that must respond to an investigation or litigation.

The organization at level 1 does not know what its records are, must respond to inquiries and demands on an ad hoc basis, and cannot demonstrate any rational means to respond. Under the teaching of *Pension Committee*, this organization would likely be found to be grossly negligent should it fail to preserve (or produce) information.

Level 2 – In Development

At level 2, the organization has "identified the rules and regulations that govern its business and introduced some compliance policies … but "[p]olicies are not complete and there is no apparent or well-defined accountability for compliance." Moreover, although the organization has some "hold process," that process is "not well-integrated with the organization's information management and discovery processes."

As with level 1, level 2 is not a place for an organization to be when faced with an investigation or litigation. The organization has tried, but it is not yet in compliance with legal or business requirements. Likewise, although the organization recognizes the duty to preserve, the organization's preservation process is not thorough. Although every organization must be at level 2 at some point in its corporate existence, the organization appears ripe for a finding of, at the least, negligence, should it lose information.

Level 3 – Essential

Level 3 finds the organization on safer ground. Here, again among other things, the organization has "identified all relevant compliance laws and regulations." The organization has "systematically carried out" its creation and "capture" of records. The organization has a "strong code of business conduct" and has integrated its litigation hold process into "information management and discovery processes for the 'most critical' systems."

At level 3, an organization is likely to meet its preservation obligations and, just as importantly, be able to demonstrate to a regulator or court what it did to preserve, what it did or did not preserve before a hold went into effect, and what it can or cannot produce.

Perhaps more importantly from a risk management viewpoint, an organization that has attained level 3 has a strong argument that it is entitled to the protection of FRCP 37(e) (and its equivalent in many states), which would shield it from a sanction imposed under the rules for the unintentional loss of relevant ESI due to the routine operation of its electronic information system, such as the loss of data attributable to an auto-delete function or the recycling of backup media.

Level 4 – Proactive

Level 4 should bring an organization even more comfort. Among other things, systems have been implemented to "capture and protect records." Metadata is available to "demonstrate and measure compliance." There are regular audits and training of employees. Lack of compliance is "remedied through implementation of defined corrective actions."

This feature plainly describes why an organization might elect to reach level 5: "The organization suffers few or no adverse consequences based on information governance and compliance failures."

All these features are available to an organization when it must demonstrate to a court and regulator what it can and cannot do, and militate in favor of the court or regulator finding that the organization acted in good faith and complied with its obligations in a reasonable and demonstrable manner.

Level 5 – Transformational

At level 5, "[t]he importance of compliance and the role of records and information…are clearly recognized at the senior management and board levels." Moreover, among other things, "[t]he roles and processes for information management and discovery are integrated." This feature plainly describes why an organization might elect to reach level 5: "The organization suffers few or no adverse consequences based on information governance and compliance failures."

The reader should look at each of the other principles and fit each level into the frameworks of government investigations and litigation, as did this white paper with the Principle of Compliance.

The Principle of Disposition

This white paper has applied the Model to litigation and investigations and, for illustrative purposes, focused on the Principle of Compliance. The white paper is not intended to minimize the importance of any

other principle to a successful records management program. However, and again for illustrative purposes only, there should be some reference to the Principle of Disposition.

This principle states: "An organization shall provide secure and appropriate disposition for records that are no longer required to be maintained by applicable laws and the organization's policies."

At level 4, "[d]isposition procedures are understood by all and are consistently applied," and, vital for the purposes of this white paper, "[t]he process for suspending disposition due to legal holds is defined, understood, and used consistently across the organization."[3]

The maturity reflected in level 4 should be of great benefit to any organization that finds itself entangled in a government investigation or litigation, either as a party or a third-person respondent to a subpoena. The organization has in place systems to capture and protect information, has a well-managed litigation hold process in place, and understands the need to make any litigation hold effective.

Moreover, the organization recognizes that disposition of records is subject to the duty to preserve and that, once the duty no longer exists, disposition becomes appropriate subject to any records management policies. The protection afforded by Rule 37(e) of the FRCP (see above) should also be available to an organization at level 4.

Why is disposition important? First, although information can be an asset, it can also be a burden; records management imposes costs, both in personnel and other resources. Those costs can be managed through the creation and enforcement of records retention policies.

Second, the failure to dispose of records simply increases the volume of information that an organization possesses, along with the possible need to identify and process information (with backup media being the perfect example) for future investigations or litigation. There appears to be no good reason to keep information that an organization does not need to keep.

The maturity reflected in level 4 should be of great benefit to any organization that finds itself entangled in a government investigation or litigation, either as a party or a third-person respondent to a subpoena.

Conclusion

When the reader looks at each principle and level under the Model, its application to litigation and investigations should spring to mind. Sub-standard levels of performance invoke the specter of findings of gross negligence or negligence in litigation. Likewise, failures to adequately respond to government investigations can have nothing other than bad consequences.

Accordingly, this white paper suggests that as organizations engage in cost-benefit analyses to decide which level is appropriate under each principle, only levels 3 and 4 are sufficient to manage both compliance and business needs. Level 5, the transformational level, is, of course, an ideal to aspire to. Nevertheless, this white paper acknowledges the costs inherent in reaching level 5 and acknowledges how difficult it is to reach that ideal.

Indeed, as the reader looks at the Model and considers *Pension Committee* and other decisions, several conclusions can be drawn:

- As these decisions make clear, however a particular organization chooses which level and principle to meet, the cost-benefit analysis must consider, among other things, the degree to which the organization expects to become involved in litigation or investigations and the expense of establishing or implementing a legal hold program.
- Any cost-benefit analysis must involve counsel, whether in-house or retained, to inform management of the contours of litigation and investigations and what organizations can expect.

This white paper has explored the interplay between records management and litigation or investigations. It advocates application of the Information Governance Maturity Model from a merged perspective: one that recognizes that the best records management policies anticipate the demands of litigation and investigations.

Levels 1 and 2 are not where organizations want to be. Levels 3 and 4 are adequate for the tasks of preservation and production. Plainly, level 5 is where every organization would like to be, depending on the resources and leadership available.

About the Author

Ronald J. Hedges served as a United States Magistrate Judge in the District of New Jersey from 1986 to 2007. He is a member of the advisory board of The Sedona Conference® and several of its working groups, including those addressing e-discovery and records management. Hedges is also a member of the advisory boards of the Corporate Counsel and Advanced E-Discovery Institutes of Georgetown University Law Center, where he serves on the adjunct faculty and teaches e-discovery and evidence. Since 2010, he also has been a visiting research collaborator at the Center for Information Technology Policy at Princeton University. He is the author of numerous publications, including Discovery of Electronically Stored Information: Surveying the Legal Landscape. *Hedges consults on varied topics, including e-discovery and records management. He may be contacted at* r_hedges@live.com.

Acknowledgements

The author and ARMA International also wish to acknowledge Kenneth J. Withers, Director, Judicial Education and Content, The Sedona Conference®, www.thesedonaconference.org, *for his valuable contributions to this paper.*

[3] For a discussion of how an organization might implement disposition, see *Contracted Destruction for Records and Information Media*. Overland Park, Kansas: ARMA International, 2009.

ARMA International's Generally Accepted Recordkeeping Principles®

Records and recordkeeping are inextricably linked with any organized activity. As a key resource in the operation of any organization, records must be created, organized, secured, maintained, and used in a way that effectively supports the activity of that organization, including:

- Facilitating and sustaining day-to-day operations
- Supporting predictive activities such as budgeting and planning
- Assisting in answering questions about past decisions and activities
- Demonstrating and documenting compliance with applicable laws, regulations, and standards

These needs can be fulfilled only if recordkeeping is an objective activity, insulated from individual and organizational influence or bias, and measured against universally applicable principles. To achieve this transparency, organizations must adhere to objective records and information management standards and principles, regardless of the type of organization, type of activity, or the type, format, or media of the records themselves. Without adherence to these standards and principles, organizations will have poorly run operations, legal compliance failures, and -- potentially – a mask for improper or illegal activities.

Principle of Accountability

An organization shall assign a senior executive who will oversee a recordkeeping program and delegate program responsibility to appropriate individuals, adopt policies and procedures to guide personnel, and ensure program auditability.

Principle of Integrity

A recordkeeping program shall be constructed so the records and information generated or managed by or for the organization have a reasonable and suitable guarantee of authenticity and reliability.

Principle of Protection

A recordkeeping program shall be constructed to ensure a reasonable level of protection to records and information that are private, confidential, privileged, secret, or essential to business continuity.

Principle of Compliance

A recordkeeping program shall be constructed to comply with applicable laws and other binding authorities, as well as the organization's policies.

Principle of Availability

An organization shall maintain records in a manner that ensures timely, efficient, and accurate retrieval of needed information.

Principle of Retention

An organization shall maintain its records and information for an appropriate time, taking into account legal, regulatory, fiscal, operational, and historical requirements.

Principle of Disposition

An organization shall provide secure and appropriate disposition for records that are no longer required to be maintained by applicable laws and the organization's policies.

Principle of Transparency

The processes and activities of an organization's recordkeeping program shall be documented in an understandable manner and be available to all personnel and appropriate interested parties.

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Until next rules change, 2010 cases set the standard

When it comes to preservation obligations, Judge Scheindlin has drawn the brightest lines.

BY BRAD HARRIS AND RON HEDGES

By now the names are all too familiar: *Pension Committee*, *Rimkus*, *Victor Stanley II* and *Orbit One*. A raft of opinions in the U.S. courts throughout 2010 and beyond highlight the uncertainty and growing risk associated with the lack of uniformity around preservation practices in the Information Age. Not surprising, such lack of specificity and consistent direction results in attorneys, both retained and inside counsel, being obligated to perhaps conform to a "lowest" or "highest"—depending on one's perspective—preservation standard. And an unfortunate consequence is that some attorneys and their clients may fail to act at all out of confusion, while others overreact and self-impose undue burdens. These reactions only worsen the problem for the legal community and litigants.

Many commentators agree that greater uniformity is needed. However, the best approach may take time to gain momentum and even longer to gel into a formal amendment to the Federal Rules of Civil Procedure or other laws. Nevertheless, *Pension Committee*, together with *Rimkus* and *Victor Stanley II*, has begun the debate. This article will look at the events that have catalyzed the discussion and how the conversation is shaping up.

Brad Harris

Ron Hedges

Since electronic discovery came to prominence with Judge Shira Scheindlin's *Zubulake v. UBS Warburg* opinions starting in 2003, the industry focused on the technical challenges of avoiding spoliation of electronically stored information. See *Zubulake v. UBS Warburg*, 220 F.R.D. 212 (S.D.N.Y. 2003) (*Zubulake IV*) and *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004) (*Zubulake V*). Much of the focus until now has centered on how to ensure data integrity during collection, culling and

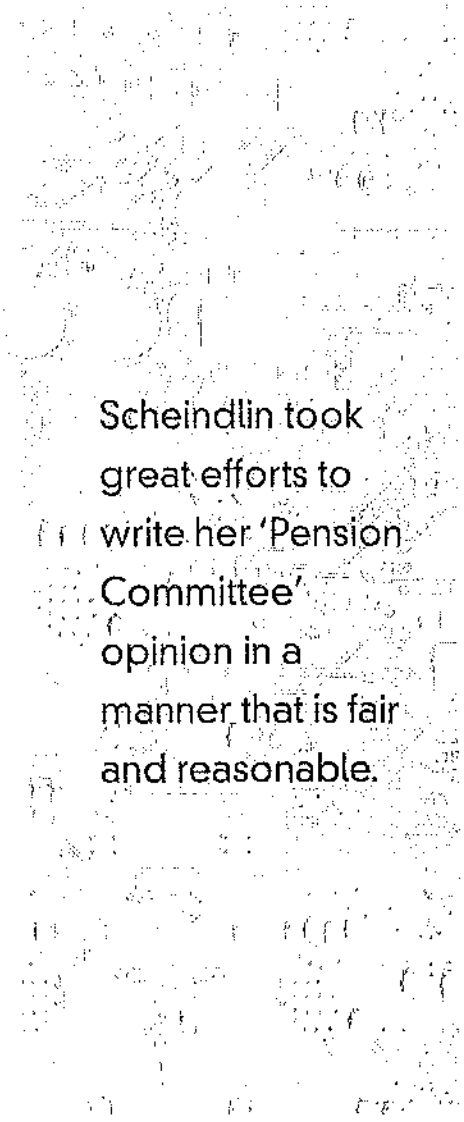
production. Yet in overcoming technical aspects of e-discovery, many practitioners overlooked the procedural aspects around legal holds and preservation. The outcome has been a growing judicial intolerance for lackadaisical attitudes and abject failures in preserving electronic information.

The bill has come due. Scheindlin issued *Pension Committee v. Banc of America Securities*, Amended Order, No. 05-cv-9016 (S.D.N.Y. Jan. 15, 2010), in January 2010 and put the spotlight on the preservation aspect of discovery response. As she noted in her opinion, this complex securities case did not involve "any egregious examples of litigants purposefully destroying evidence," making it a more challenging litigation to adjudicate because it explores the gray areas. Her findings of negligence and gross negligence for avoidable preservation failures spurred the debate, as well as her notion of relieving the burden on the system by punishing insufficient practices that slow the judicial process.

Subsequent opinions in 2010 dealt with differing sets of facts, yet reinforced a call to action. Some cases involved egregious and intentional spoliation by litigants attempting to conceal potentially incriminating evidence that was later recovered. *Rimkus Consulting v. Nickie Cammarata*, No. 07-cv-00405 (S.D. Texas Feb. 19, 2010); *Victor Stanley Inc. v. Creative Pipe Inc.*, 2010 WL 3530097 (D. Md. Sept. 9, 2010) (*Victor Stanley II*). Still others confronted issues of inadvertently lost data that needed to be evaluated regarding the degree to which it did or did not prejudice the opponent's case. *Orbit One Communications Inc. v. Numerex Corp.*, 2010 WL 4615547 (S.D.N.Y Oct. 26, 2010).

As Judge Paul Grimm noted in *Victor Stanley II*, "[r]ecent decisions...have generated concern...regarding the lack of uniform national standard governing" preservation and spoliation issues. In particular, he acknowledged that the courts are struggling with a number of specific concerns:

- To know when the duty to preserve attaches.
- The level of culpability required to justify sanctions.
- The nature and severity of sanctions.
- The scope of the duty to preserve and whether it is tempered by proportionality.



PERFECTION ISN'T THE STANDARD

Scheindlin reiterated in *Pension Committee* that "[c]ourts cannot and do not expect that any party can meet a standard of perfection." So if perfection is unattainable, what should the courts and litigants expect?

Such uncertainty is driving the call for uniform standards nationally. Among other things, both state and federal courts struggle with what might be called a "trilogy" of relevance, prejudice and intent:

- Relevance: How can the relevance of electronic information be established when that information no longer exists?
- Prejudice: How can a party show that it has been prejudiced by the loss of electronic information?
- Intent: Is negligent loss of electronic information sufficient for the imposition of severe sanctions or must there be some showing of intentional misconduct?

With regard to prejudice, the U.S. circuit courts disagree as to whether it must be shown: The U.S. courts of appeals for the 4th and 7th circuits have found that intentional conduct is sufficient to presume relevance whereas negligent or grossly negligent conduct is not; the 5th says that presumption is rebuttable; and in the 2d, opinions include Magistrate Judge James Francis' in *Orbit One*, which requires presumption and relevance, as well as Scheindlin's in *Pension Committee*, which rejects the "pure heart, empty head" defense, holding that prejudice may be presumed. With regard to intent, some circuits differ in the level of intent required before sanctions are imposed—some requiring a threshold of bad faith, while others require intentional or willful conduct and still others warrant sanctions for mere negligence.

THE ROAD TO NEW RULES

The dissonance between the various circuits is building a strong case to update the Federal Rules of Civil Procedure. The momentum has been building because of the uncertainty counselors

face in advising clients involved in civil litigation that has the possibility of reaching the federal court system. By default, attorneys are obliged to practice to the strictest standard (routinely acknowledged to be articulated by the findings in *Pension Committee*).

The calls for change started to build during the Conference on Civil Litigation held at Duke Law School in May 2010. The Duke Conference's E-Discovery Panel, which included prominent federal jurists, developed a list of key areas. According to member Scheindlin, during a subsequent public discourse, "the consensus of the panel members was that there is an acute need for increased certainty and predictability in connection with the accrual, scope, and enforcement of preservation duties."

The e-discovery panel discussed a proposed rule designed to address the following issues:

- General and specific triggers for attachment of the obligation to preserve information, including electronically stored information.
- The scope of the preservation duty, including both time frame and the types of covered data and data sources.
- The form or format in which data subject to preservation should be maintained.
- Limitations and guidance for determining the individual database users and data custodians for whom detailed data must be captured and preserved.
- Preservation standards applicable to nonparties.
- Limitations as to the duration of preservation duties and their applicability to postsuit records and data.
- The contours of a safe harbor for organizations using formal litigation hold procedures.
- The extent to which internal efforts to ensure and accomplish proper preservation should be protected as work product.
- The consequences and related procedural requirements applicable in instances of alleged breaches of the preservation duty.

A group of associations that represent the defense bar collaborated on a policy paper that proposes changes to rules 26 and 34 to limit the scope of discovery "on the claims and defenses in the action" as asserted in pleadings, and to explicitly invoke the principle of proportionality.

In their paper, Lawyers for Civil Justice, et al., "Reshaping the Rules of Civil Procedure for the 21st Century," May 2, 2010, the authors reached the conclusion that "preservation has developed into one of the most vexing issues affecting civil litigation in today's federal courts." All too often, organizations fear a conundrum of "damned if you do, damned if you don't" when it comes to deciding when a preservation duty attaches and what will constitute reasonable and good-faith preservation efforts. Clearly, greater clarity and consistency from rules-making bodies is warranted that will be consistently applied and proportional in approach. The group is trying to get away from the costly process of "discovery about discovery," which has risen at an alarming rate.

Another area of focus is existing litigation-hold expectations that have been created on an ad hoc basis by the courts. More guidance is required, including a proposal to permit spoliation sanctions "only where willful conduct for the purpose of depriving the other party of the use of the destroyed evidence results in actual prejudice to the other parties."

Leading e-discovery expert Maura Grossman recently wrote that "it seems fairly obvious at this point that the most likely consequence of this inconsistency and uncertainty is that there will be some changes to the Federal Rules, most likely to Federal Rule of Civil Procedure 37," which covers the failures to make disclosures and to cooperate in discovery. Maura Grossman, "Pension Committee: A Catalyst for a Change in the Federal Rules?," Pension Committee Revisited: One Year Later 30 (Zapproved Inc. 2011).

Rules changes will take time, using a process designed to ensure changes are implemented in a thoughtful and reasoned manner. Unfortunately, this built-in lag creates periods when the practice of law is ahead of the rules-making bodies. Until then, litigators should continue to aspire to the *Pension Committee* standard, including implementing timely legal holds, taking steps to ensure that recipients understand and act appropriately and being actively engaged in the preservation and collection processes.

The good news is that, despite the controversy, Scheindlin took great efforts to write her opinion in a scholarly manner that is fair and reasonable when one gets beyond the "sound bites." Until the Federal Rules of Civil Procedure can take their place, the brightest lines remain those that Scheindlin has drawn for us.

Brad Harris is vice president of legal products for Zapproved Inc., and has more than 25 years of experience in the high-technology and enterprise software sectors. Ron Hedges is principal at Ronald J. Hedges LLC. He was appointed in 1986 as a U.S. magistrate judge in the District of New Jersey, where he served as the compliance judge for the Court Mediation Program. He is a member of the Lawyers Advisory Committee, and both a member and reporter for the Civil Justice Reform Act Advisory Committee.

The Sedona Conference® Glossary

E-Discovery and Digital Information Management (Second Edition, 2007)

This authoritative 59-page Glossary is an outgrowth of The Sedona Conference Working Group on Electronic Document Retention and Production (WG1) and represents the work of its RFP+ Group: a panel of users of electronic discovery vendor services (two from defense firms, two from plaintiff firms, one from a corporate law department, and one consultant/attorney) with input from the RFP+ Vendor Panel, a group of over 35 electronic discovery vendors who signed up as members to support this effort in response to an open invitation, and significant input from the public since the first edition was published in 2005. The goal is to create a common language to facilitate the process of communication between client and counsel, between counsel and e-discovery product and service vendors, between opposing counsel negotiating the scope and conduct of e-discovery. It has also been cited in law review articles and by state and federal courts in ediscovery decisions.

The Glossary defines more than 500 e-discovery terms, from **ablate**[1] to **zettabyte**[2], including such commonly used (and often misused) terms as **deletion**[3] and **metadata**[4].

The full text of the Glossary is available free for personal use from The Sedona Conference® web site at www.thesedonaconference.org.

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[1] "**Ablate:** Describes the process by which laser-readable 'pits' are burned into the recorded layer of optical discs, DVD-ROMs and CD-ROMs."

[2] "**Zettabyte:** 1,180,591,620,717,411,303,424 bytes - 10247 (a sextillion bytes). *See* Byte."

[3] "**Deletion:** Deletion is the process whereby data is removed from active files and other data storage structures on computers and rendered inaccessible except through the use of special data recovery tools designed to recover deleted data. Deletion occurs on several levels in modern computer systems: (a) File level deletion renders the file inaccessible to the operating system and normal application programs and marks the storage space occupied by the file's directory entry and contents as free and available to re-use for data storage, (b)Record level deletion occurs when a record is rendered inaccessible to a database management system (DBMS)(usually marking the record storage space as available for re-use by the DBMS, although in some cases the space is never reused until the database is compacted) and is also characteristic of many email systems (c) Byte level deletion occurs when text or other information is deleted from the file content (such as the deletion of text from a word processing file); such deletion may render the deleted data inaccessible to the application intended to be used in processing the file, but may not actually remove the data from the file's content until a process such as compaction or rewriting of the file causes the deleted data to be overwritten."

[4] "**Metadata:** Data typically stored electronically that describes characteristics of ESI, found in different places indifferent forms. Can be supplied by applications, users or the file system. Metadata can describe how, when and by whom ESI was collected, created, accessed, modified and how it is formatted. Can be altered intentionally or inadvertently. Certain metadata can be extracted when native files are processed for litigation. Some metadata, such as file dates and sizes, can easily be seen by users; other metadata can be hidden or embedded and unavailable to computer users who are not technically adept. Metadata is generally not reproduced in full form when a document is printed to paper or electronic image. See also Application Metadata, Document Metadata, Email Metadata, Embedded Metadata, File System Metadata, User-Added Metadata and Vendor-Added Metadata. For a more thorough discussion, see *The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age* (Second Edition)."

Sedona Conference

The Sedona Conference® Database Principles

Addressing the Preservation of Databases and Database Information in Civil Litigation

The Sedona Conference® Database Principles Addressing the Preservation of Databases and Database Information in Civil Litigation is the latest major publication of The Sedona Conference® Working Group on Electronic Document Retention and Production (WG1) and proposes six Principles addressing the preservation and production of databases in civil litigation. The Commentary offers a number of practical suggestions in an effort to clarify the obligations of both requesting and producing parties, and to simplify discovery in matters involving databases and information derived from databases. The Commentary is divided into three discrete sections. Following a brief Introduction to databases and database theory, Section II addresses how *The Sedona Principles,* which pertains to all forms of ESI, may be applied to discovery of databases. Section III proposes new Principles that pertain specifically to databases and provides commentary to support the recommendations proposed in the Commentary.

Principle 1: Absent a specific showing of need or relevance, a requesting party is entitled only to database fields that contain relevant information, not the entire database in which the information resides of the underlying database application or database engine.

Principle 2: Due to differences in the way that information is stored or programmed into a database, not all information in a database may be equally accessible, and a party's request for such information must be analyzed for relevance and proportionality.

Principle 3: Requesting and responding parties should use empirical information, such as that generated from test queries and pilot projects, to ascertain the burden to produce information stored in databases and to reach consensus on the scope of discovery.

Principle 4: A responding party must use reasonable measures to validate ESI collected form database systems to ensure completeness and accuracy of the data acquisition.

Principle 5: Verifying information that has been correctly exported from a larger database or repository is a separate analysis from establishing the accuracy, authenticity, or admissibility of the substantive information contained in the data.

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The Sedona Conference® Cooperation Guidance for Litigators & In-House Counsel

The Sedona Conference® issued its *Cooperation Proclamation* in 2008, launching "a coordinated effort to promote cooperation by all parties to the discovery process to achieve the goal of a 'just, speedy, and inexpensive determination of every action.'" The intent is "to promote open and forthright information sharing, dialogue (internal and external), training, and the development of practical tools to facilitate cooperative, collaborative, transparent discovery. This *Proclamation* challenges the bar to achieve these goals and refocus litigation toward the substantive resolution of legal disputes."

The *Cooperation Proclamation* acknowledged that what is required is a "paradigm shift for the discovery process" and that The Sedona Conference® envisioned a three-part process: (1) awareness (the *Proclamation* itself), (2) commitment (the writing of a Brandeis brief-style "The Case for Cooperation" developing a detailed understanding and full articulation of the issues and changes needed to obtain cooperative fact-finding, and (3) tools—"developing and distributing practical "tool kits" to train and support lawyers … in techniques of discovery cooperation, collaboration, and transparency."

The Sedona Conference® Cooperation Guidance for Litigators & In-House Counsel comprises the third part of the three-part process—practical toolkits designed for training and supporting lawyers in techniques of discovery cooperation, collaboration, and transparency. The separate guidance documents for litigators and in-house counsel are each organized around "cooperation points"—opportunities to engage in cooperative behavior in an effort to bring efficiency and efficacy to the discovery process allowing more disputes to be resolved on their merits consistent with Federal Rule of Civil Procedure 1. A companion document for the Bench—*Cooperation Proclamation: Resources for the Bench*—is being published contemporaneously with these toolkits for counsel.

The Sedona Conference® Cooperation Proclamation: Resources for the Judiciary

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The Sedona Conference® Cooperation Proclamation: Resources for the Judiciary is one of those practical "took kits," designed for training and supporting state and federal judges in techniques of case management, to foster the goals of Rule 1 of the Federal Rules of Civil Procedure: the "just, speedy, and inexpensive" resolution of civil actions. The *Resources* focus on the concept of "active" case management by a judge. However, the *Resources* recognize that, for various reasons, case management may of necessity be "reactive" rather than "proactive" and that discovery is intended to be party-, not judge-, driven. The Resources make recommendations with regard to electronically stored information (ESI) throughout all stages of litigation, including trial, and include sample orders to assist judges in the management of all the stages. A companion document for litigators and in-house counsel—*Cooperation Guidance for Litigators & In-House Counsel*—has been published contemporaneously with this toolkit for the Bench.

The full text of the Resources for the Judiciary is available free for individual download from The Sedona Conference® web site at www.thesedonaconference.org.

The Sedona Conference

The Sedona Conference® Commentary on Legal Holds: The Trigger & The Process

Information is the lifeblood of the modern world, a fact that is at the core of our litigation discovery system. The law has developed rules regarding the manner in which information is to be treated in connection with litigation. One of the principal rules is that whenever litigation is reasonably anticipated, threatened or pending against an organization that organization has a duty to preserve relevant information. This duty arises at the point in time when litigation is reasonably anticipated whether the organization is the initiator or the target of litigation.

The duty to preserve information includes an obligation to identify, locate, and maintain, information that is relevant to specific, predictable, and identifiable litigation. When preservation of electronically stored information ("ESI") is required, the duty to preserve supersedes records management policies that would otherwise result in the destruction of ESI. A "legal hold" program defines the processes by which information is identified, preserved, and maintained when it has been determined that a duty to preserve has arisen.

The basic principle that an organization has a duty to preserve relevant information in anticipation of litigation is easy to articulate. However, the precise application of that duty can be elusive. Every day, organizations apply the basic principle to real-world circumstances, confronting the issue of when the obligation is triggered and, once triggered, what is the scope of the obligation. This 24-page Commentary, intended to provide guidance on those issues, is divided into two parts: The "trigger" and the "process."

Part I addresses the trigger issue and provides practical guidelines for making a determination as to when the duty to preserve relevant information arises. What should be preserved and how the preservation process should be undertaken including the implementation of legal holds is addressed in Part II. The keys to addressing these issues are reasonableness and good faith. The guidelines are intended to facilitate reasonable and good faith compliance with preservation obligations. The guidelines are meant to provide the framework an organization can use to create its own preservation procedures. In addition to the guidelines, suggestions as to best practices are provided along with several illustrations as to how the guidelines and best practices might be applied under hypothetical factual situations.

Guideline 1: Reasonable anticipation of litigation arises when an organization is on notice of a credible threat it will become involved in litigation or anticipates taking action to initiate litigation.

Guideline 2: The adoption and consistent implementation of a policy defining a document retention decision-making process is one factor that demonstrates reasonableness and good faith in meeting preservation obligations.

Guideline 3: The use of established procedures for the reporting of information relating to a potential threat of litigation to a responsible decision maker is a factor that demonstrates reasonableness and good faith in meeting preservation obligations.

Guideline 4: The determination of whether litigation is reasonably anticipated should be based on good faith, reasonableness, a reasonable investigation and an evaluation of the relevant facts and circumstances.

Guideline 5: Judicial evaluation of a legal hold decision should be based on the good faith and reasonableness of the decision (including whether a legal hold is necessary and how the legal hold should be executed) at the time it was made.

Guideline 6: When a duty to preserve arises, reasonable steps should be taken to identify and preserve relevant information as soon as is practicable. Depending on the circumstances, a written legal hold (including a preservation notice to persons likely to have relevant information) should be issued.

Guideline 7: In determining the scope of information that should be preserved, the nature of the issues raised in the matter, experience in similar circumstances and the amount in controversy are factors that may be considered.

Guideline 8: A legal hold is most effective when it:

(a) Identifies the persons who are likely to have relevant information and communicates a preservation notice to those persons;

(b) Communicates the preservation notice in a manner that ensures the recipients will receive actual, comprehensible and effective notice of the requirement to preserve information;

(c) Is in written form;

(d) Clearly defines what information is to be preserved and how the preservation is to be undertaken;

(e) Is periodically reviewed and, when necessary, reissued in either its original or an amended form.

Guideline 9: The legal hold policy and process of implementing the legal hold in a specific case should be documented considering that both the policy and the process may be subject to scrutiny by the opposing party and review by the court.

Guideline 10: The implementation of a legal hold should be regularly monitored to ensure compliance.

Guideline 11: The legal hold process should include provisions for the release of the hold upon the termination of the matter at issue.

The Sedona Conference

The Sedona Conference® Commentary on Proportionality in Electronic Discovery

This Commentary discusses the origins of the doctrine of proportionality, provides examples of its application, and proposes principles to guide judges, attorneys, and parties in both federal and state courts. The Commentary analyses the proportionality considerations found in the Federal Rules of Civil Procedure, especially the 2006 amendments to Rule 26, designed to guide courts to in assessing whether "the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues." It also discusses the attention courts have recently been paying to Rule 26(g), which – in the words of the Civil Rules Advisory Committee – is designed to provide "a deterrent to both excessive discovery and evasion by imposing a certification requirement that obliges each attorney to stop and think about the legitimacy of a discovery request, a response thereto, or an objection."

The Commentary concludes by proposing and discussing the following "Principles of Proportionality:"

Principle 1. The burdens and costs of preservation of potentially relevant information should be weighed against the potential value and uniqueness of the information when determining the appropriate scope of preservation.

Principle 2. Discovery should generally be obtained from the most convenient, least burdensome, and least expensive sources.

Principle 3. Undue burden, expense, or delay resulting from a party's action or inaction should be weighed against that party.

Principle 4. Extrinsic information and sampling may assist in the analysis of whether requested discovery is sufficiently important to warrant the potential burden or expense of its production.

Principle 5. Nonmonetary factors should be considered when evaluating the burdens and benefits of discovery.

Principle 6. Technologies to reduce cost and burden should be considered in the proportionality analysis.

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DIGITAL DISCOVERY & E-EVIDENCE

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BEST PRACTICES

Ronald J. Hedges introduces "The Flow of Litigation," and suggests that electronic discovery can be managed—and economies realized—by using case management tools authorized by the Federal Rules of Civil Procedure.

Case Management and E-Discovery: Perfect Together?

BY RONALD J. HEDGES

Readers of *Digital Discovery & e-Evidence*® may be excused if they focus on electronically stored information ("ESI") and the ins-and-outs of electronic discovery. After all, that is what binds the reader to the publication.

Nevertheless, electronic discovery must be put in context. That context, for the purposes of this article, is the management of all discovery under the Federal Rules of Civil Procedure. Fed. R. Civ. P. 1 states that the rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." Electronic discovery can be managed to that end..

The Burdens of Discovery. "[C]ases in federal courts take too long and cost litigants too much. As a consequence, proponents of reform argue, some litigants are denied access to justice and many litigants incur inappropriate burdens when they turn to the courts for assistance in resolving disputes."

Sound familiar? The concern certainly is, but the quote comes from "Just, Speedy and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act," published by the RAND Institute for Civil Justice in 1996.

Early Commentary. The Civil Justice Reform Act itself was enacted in 1990 "to explore the causes and delay in civil litigation." (*The Civil Justice Reform Act, Final Report, Alternative Proposals for Reduction of Cost and Delay Assessment of Principles, Guidelines & Techniques* at 1 (Judicial Conference of the United States: May, 1997)).

The RAND Institute undertook an independent evaluation of measures undertaken by United States district courts "[t]o provide an empirical basis for assessing new procedures adopted under the act." *Just, Speedy and Inexpensive* at 1. This article is not intended to be a history of the Act or what the United States courts did to implement it. However, for our purposes, one conclusion is on point: "[W]hat judges do to manage cases matters: If early case management and early setting of the trial schedule are combined with shortened discov-

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ery cutoff, the increase in costs associated with the former can be offset by the decrease in costs associated with the latter." *Just, Speedy and Inexpensive* at 2.

Somewhat ironically, the Judicial Conference of the United States (FJC), in espousing a cost and delay reduction plan alternative to that proposed by RAND, suggested that, "[t]he prudent use of modern telecommunications and other electronic technologies has the potential to save a significant amount of time and cost in civil litigation." *Final Report* at 4.

Applicability to Electronically Stored Information. These technologies did not address electronic discovery per se other than to suggest "[c]onducting scheduling and discovery conferences by telephone, when appropriate," and "using on-line and video telecommunications technologies to facilitate more efficient judicial proceedings." *Final Report* at 22.

A reader can be forgiven for wondering if the Judicial Conference had any idea what discovery would encompass within a few years.

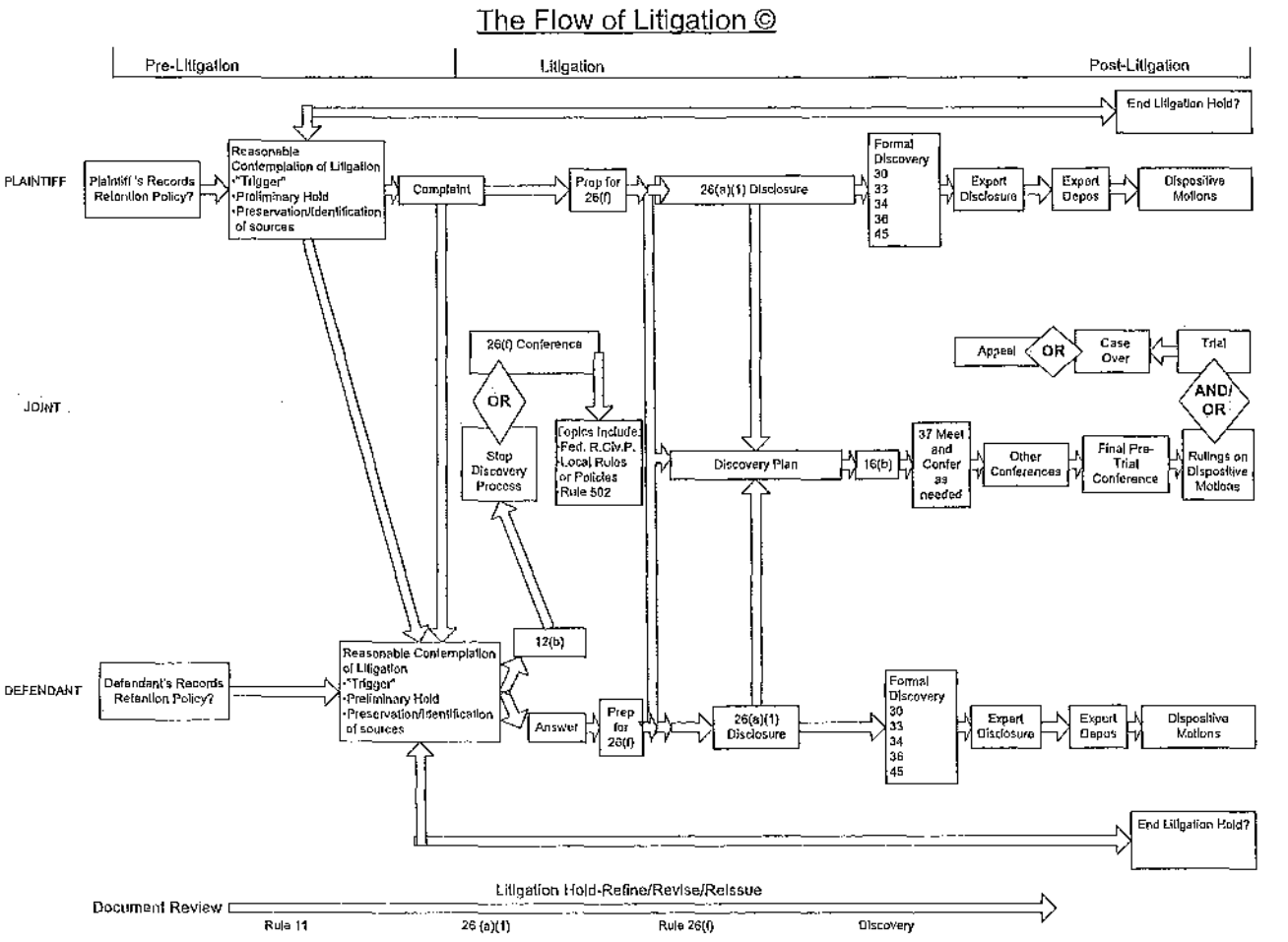
Everyone knows, at least anecdotally, that electronic discovery can be expensive. The RAND Institute has been attempting to quantify those costs and has called for more research on the subject. Everyone knows, at least anecdotally, that a (or "the") major component of costs associated with electronic discovery is privilege review. See, Allman, Thomas Y., "Addressing Excessive Review Costs: The Ephemeral Promise of 'Quick Peeks' and the Need for Proportionate Discovery and Cost Shifting," 9 *DDEE* 5, pp. 142-145 (5/1/09).

What can a federal court do today to manage and, working with counsel before it, minimize those costs? This article begins a discussion of that management by focusing on several cost-savings measures.

Stays of Discovery. Unfortunately, some electronic discovery costs must be incurred in the earliest stage of litigation, indeed, before litigation begins. Many spoliation disputes arise out of a defendant's failure to preserve relevant ESI when the defendant should have reasonably contemplated litigation against it. See, e.g., D. J. Kessler and R. D. Owen, "Outlier or Harbinger? Recent Case Invents New Preservation and Information Management Duties for Corporation," 9 *DDEE* 6, pp. 176-179 (6/1/09).

What is less readily seen, however, are spoliation disputes arising out of a plaintiff's failure to do so. See, e.g., *Innis Arden Golf Resort Club, Inc. v. Pitney Bowes, Inc.*, 2009 U.S.Dist. LEXIS 43588 (D. Conn. May 21, 2009). A putative plaintiff must, at some point, collect and review ESI in order to comply with its Rule 11 obligations before filing a pleading and must preserve relevant ESI, just as a defendant must.

Practice Pointers. What can be done to control costs of production after these "preliminary" ESI-related costs are incurred? There are several opportunities to



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do so, as displayed on the Flow of Litigation chart[1], above. The chart illustrates the course of typical federal civil litigation and can be used to locate "firebreaks" where some cost-savings measures can be imposed. Some examples include:

(1) When a defendant makes a dispositive motion in lieu of filing an answer, seek a stay of discovery (assuming that a stay is discretionary and not mandated by law). This may not be a simple matter. For example, Local Civil Rule 26(a) of the Eastern District of Texas provides: "Absent court order to the contrary, a party is not excused from responding to discovery because there are pending motions to dismiss, to remand or to change venue."

(2) If there is no stay, consider whether modification or suspension of automatic disclosures under Rule 26(a)(1) might be appropriate. "Prediscovery disclosure avoids the cost of unnecessary formal discovery and accelerates the exchange of basic information to plan and conduct discovery and settlement negotiations. The judge should administer Rule 26(a)(1) to serve these purposes; disclosure should not place unreasonable or unnecessary burdens on the parties . . . ." Moreover, "[t]he scope of disputed issues and relevant facts . . . may not be sufficiently clear from the pleadings to enable parties to make the requisite disclosure." *Manual for Complex Litigation* (4th) § 11.13 (FJC, 2004) (*Manual*).

Unfortunately, proportionality does not appear to be utilized often enough either by courts or parties.

"Staging" Discovery. For better or for worse, "[t]he general principle governing the scope of discovery stated in Rule 26(b)(1) permits discovery of matters, not privileged, 'relevant to the claim or defense of any party.' The court has discretion to expand that to 'any matter relevant to the subject matter involved in the action.' " *Manual*, § 11.41.

Plainly, as we all know, discovery under either standard can be costly. Leaving aside disputes about the scope of discovery in a particular action, opportunities to limit electronic discovery costs include, among other things:

(1) Bifurcating discovery between liability and damages, with the latter being undertaken only after a dispositive motion on liability is made and decided.

(2) Focusing discovery on a (or "the") central issue in an action, as a precursor to settlement negotiations.

(3) Agreeing to defer any request for discovery of ESI from sources that may be not reasonably accessible under Rule 26(b)(2)(B) until all requested ESI from "accessible" sources has been produced.

Proportionality. Unfortunately, proportionality does not appear to be utilized often enough either by courts or parties. For example, "[t]he [Advisory] Committee has been told repeatedly that courts have not implemented these limitations with the vigor that was contemplated." *GAP Report of Advisory Committee to 2000 Amendment to Rule 26(b)(1)*, 192 F.R.D. 340, 390 (2000).

Perhaps such under utilization is changing. Federal courts are using the proportionality rule to control electronic discovery costs. See, e.g., *Spieker v. Quest Cherokee LLC*, 2008 WL 4758604 (D. Kan. Oct 30, 2008). However, parties should use Rule 26(b)(2)(C) as a guide to limiting—or at least sequencing—electronic discovery along the lines suggested above.

In the alternative, parties should be reminded that the rule allows judges to raise proportionality "on its own."

A First Step. This article and the illustrative chart that accompanies it is intended to open discussion by parties and judges on the use of active case management to control electronic discovery costs. It requires parties to engage in serious meet-and-confers under Rule 26(f) and to be prepared to think "outside the box." It also encourages judges to grapple with electronic discovery issues as soon as practicable. Together, judges and parties should craft cost-effective solutions to the problem of the costs of electronic discovery.

[1]

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BEST PRACTICES

In the July 1 issue of *Digital Discovery & e-Evidence*®, Ronald J. Hedges suggested that active case management (by judges and attorneys) is the key to controlling cost and delay that can result from discovery of electronically stored information (ESI), making reference to motions to dismiss in lieu of answers and reasons to seek stays of discovery rather than beginning the discovery process. That analysis is supplemented by noting the effect of the new pleading standards expounded by the United States Supreme Court in *Twombly* and *Iqbal*, and the conclusion is reached that even under those cases, parties will likely continue to incur at least some preservation and collection-related costs before any discovery begins.

An Addendum to "Case Management and E-Discovery: Perfect Together?"

BY RONALD J. HEDGES AND MAURA R. GROSSMAN

Rule 8(a)(2) of the Federal Rules of Civil Procedure requires that, to state a claim for relief, a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief."

In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), the Supreme Court made clear that to state a claim for relief *in any civil action*, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." 129 S. Ct. at 1949. Moreover, "only a complaint that states a plausible claim for relief survives a motion to dismiss." 129 S. Ct. at 1950.

This is not the place to discuss *Iqbal* or *Twombly*, except to note that those decisions (and those of the lower courts interpreting *Twombly* and—as time passes—*Iqbal*) are likely to lead to the filing of more expansive and fact-sensitive complaints in the United States District Courts and more dispositive motion practice pursuant to Rule 12(b).

It is important to consider one important facet of both decisions: management of discovery and the possibility of cost control through that management is not a substitute for a pleading that cannot survive a motion to dismiss. *Iqbal*, 129 S. Ct. at 1953; *Twombly*, 550 U.S. at 558-600. That being said, what costs related to ESI should be expected to be incurred even if a Rule 12(b) motion and a stay of discovery are imposed?

Preservation. First, of course, there is the cost of preservation. The common law duty to preserve relevant information (whether ESI or "paper") arises when litigation is reasonably foreseeable. That duty plainly encompasses information "relevant to any party's claim or

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defense," (Rule 26(b)(1)); it may also extend to information "relevant to the subject matter involved in the action." Id.

Does that duty further extend to ESI that might be "not reasonably accessible" within the meaning of Rule 26(b)(2)(B)? Can the scope of the duty to preserve information be expanded by receipt of a demand letter from an adversary?

This Addendum does not seek to answer these questions but, rather, raises them to note that ESI and other information must be identified, preserved, and sometimes collected once a litigation hold is "triggered," regardless of whether the complaint appears likely to survive a motion to dismiss.

Rule 11 Review; Possibility of Repleading. Second, at least some of this information must be reviewed by counsel in some form or forms, both to satisfy their professional obligations to their clients and to meet their legal obligations under Rule 11(b). This process could result in further costs, as attorneys might be required to review additional information to meet the *Twombly* and *Iqbal* pleading standards.

Moreover, further costs may be imposed when parties with a deficient pleading avail themselves of the right to replead once under Rule 15(a)(1)(A), or are given leave to do so. Thus, some ESI-related costs will be incurred in any event.

Plainly, dispositive motion practice at the onset of a civil action has the possibility of greatly reducing electronic discovery costs. However, certain costs will inevitably result and, should a complaint survive a motion to dismiss, we submit that the cooperative process imposed by Rule 26(f) and active case management should be able to manage those litigation costs.

Preference for State Court? Given the new, heightened pleading standards, will putative plaintiffs elect to go into state, rather than federal, courts if they have an option to do so? Several commentators have suggested that state courts may treat electronic discovery in a "less onerous" manner and at a "slower pace." M. R. Pennington & R. J. Campbell, "The Class Action Fairness Act and the New Federal e-Discovery Rules: To Remove or Not to Remove?" *The Federal Lawyer 48* (Feb. 2009).

This seems like an improbable "solution" to the cost and delay of electronic discovery, since states may have e-discovery rules that are more stringent in certain respects than the amended Fed. R. Civ. P. (see, e.g., the treatment of information that is "not reasonably accessible" under the newly-enacted California Electronic Discovery Act).

This discussion of recent Supreme Court developments involving the earliest stages of civil litigation demonstrates that while not a panacea, the heightened standards involving the initial pleadings may pose new opportunities to reduce the cost and delay that can arise from electronic discovery.

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PRIVILEGE

Ronald J. Hedges and Jeane A. Thomas provide commentary on the recent Supreme Court ruling on the appealability of orders relating to attorney-client privilege and its implications for e-discovery.

Mohawk Industries and E-Discovery

BY RONALD J. HEDGES AND JEANE A. THOMAS

In *Mohawk Industries Inc. v. Carpenter*, 2009 WL 4573276 (Sup. Ct. Dec. 8, 2009), the U.S. Supreme Court addressed "whether disclosure orders adverse to the attorney-client privilege qualify for immediate appeal under the collateral order doctrine." *3. What are the implications of the court's answer to that question for discovery in general and discovery of electronically stored information in particular?

The Facts. The relevant facts are straightforward. Norman Carpenter was employed by Mohawk Industries. Allegedly, Carpenter advised Mohawk that it was employing illegal aliens. Unknown to Carpenter, Mohawk was embroiled in class action litigation where that allegation was central. Refusing to recant his testimony after a meeting with Mohawk's class action counsel, Carpenter was fired.

Meanwhile, the class action plaintiffs pursued discovery based on Carpenter's allegation. In defense, Mohawk revealed the "true facts" about Carpenter's discharge.

In his wrongful discharge action, Carpenter sought information about the meeting with class counsel and Mohawk's decision to discharge Carpenter. Mohawk refused to provide the information, arguing it was protected by the attorney-client privilege.

The district court found that the information sought by Carpenter was privileged, but that Mohawk had waived the privilege by its conduct in the class action. The court stayed its ruling to give Mohawk an opportunity to seek appellate review.

The Eleventh Circuit Court of Appeals rejected Mohawk's mandamus petition and dismissed its notice of appeal, concluding that the district court's order was not immediately appealable as a "collateral order" under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

The Supreme Court granted certiorari to resolve a circuit split on the "availability of collateral appeals in the attorney-client privilege context." *4 (footnote omitted).

Collateral Order Doctrine. Writing for the court, Justice Sotomayor held that the collateral order doctrine was unavailable. *Cohen* represents an exception to the finality rule of 28 U.S.C. Sec. 1291, and that exception is an extremely narrow one to the overriding policy against

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piecemeal appeals and encroaching on the prerogatives of district courts.

Justice Sotomayor stressed that "the justification for immediate appeal must therefore be sufficiently strong to overcome the usual benefits of deferring appeal until litigation concludes." Absent an important question apart from the merits and the inadequacy of post judgment review, *Cohen* is inapplicable. Moreover, in addressing the applicability of *Cohen*, an entire class of claims must be considered, rather than an individual one.

Privilege No Different? Importantly for our purposes, Justice Sotomayor rejected Mohawk's argument that the privilege waiver order in issue was distinct from "run-of-the-mill discovery orders," although she recognized the importance of the attorney-client privilege. *6. In so doing, she denied the existence of any discernible chill on the exercise of the privilege, concluding that "clients and counsel are unlikely to focus on the remote prospect of an erroneous disclosure order, let alone on the timing of a possible appeal." *7.

Appropriate Remedies. What remedies, then, did the court deem adequate? "Appellate courts can remedy the improper disclosure of privileged material in the same way they remedy a host of other erroneous evidentiary rulings: by vacating the judgment and remanding for a new trial in which the protected material and its fruits are excluded from evidence."

Alternatively, an aggrieved party (such as Mohawk) can (1) seek certification of an interlocutory discovery order pursuant to 28 U.S.C. Sec. 1292(b); (2) seek mandamus review; (3) defy the order and incur sanctions, which would be subject to post judgment review; or (4) defy the waiver order, be held in contempt, and (arguably) seek immediate review of the contempt citation. **6-7.

These are, of course, hardly appealing avenues. Mohawk itself was a victim of the discretionary nature of the appellate decision to deny a mandamus petition. And what attorney can comfortably advise its client to incur sanctions or be held in contempt in the expectation that an appellate court will reverse a district court's exercise of its discretion?

Implications. Where does *Mohawk Industries* leave attorneys and clients who must deal with the consequences of discovery orders? Several avenues that might afford some protection merit consideration:

- First, when a discovery order compels the disclosure of sensitive material, the disclosing party could seek a protective order under Fed. R. Civ. P. 26(c) to limit the scope of the disclosure to parties.
- Second, when the order is premised on the intentional disclosure of otherwise privileged material, the disclosing party could do its utmost to limit the scope of waiver pursuant to Fed. R. Evid. 502(a).
- Third, and again when the order compels the disclosure of otherwise privileged materials, the producing party could seek a nonwaiver order under Fed. R. Evid. 502(d).

Of course, these avenues are premised on a district court's willingness to extend some level of protection to materials which the court has already decided are entitled to none.

An Irony. One final comment on *Mohawk Industries* is in order: Justice Sotomayor commented on "legislation designating rulemaking, 'not expansion by court decision,' as the preferred means for determining whether and when prejudgment orders should be immediately available," and wrote eloquently of the "important virtues" of the rulemaking process under the Rules Enabling Act. *9 (quoting *Will v. Hollock*, 546 U.S. 345, 350 (2006)).

This is ironic, coming, as it does, from the court that some contend has reinterpreted well-established law on the sufficiency of pleadings and bypassed the rulemaking process in its reinterpretation of Fed. R. Civ. P. 8(a)(2). (See *Ashcroft v. Iqbal*, U. S., No. 07-1015, 5/18/09; 702 DDEEU, 7/8/09.)

Mohawk Industries is not about e-discovery per se. However, it is a cautionary tale for those who seek to challenge any interlocutory—and discretionary—discovery order.

Full text of Mohawk Industries Inc. v. Carpenter

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BNA INSIGHT

Shortly after the U.S. Supreme Court handed down its decision in *Mohawk Indus. Inc. v. Carpenter*, Ronald J. Hedges and Jeane A. Thomas provided commentary on its implications for e-discovery. In this follow-up article, they review how some jurisdictions have applied the case to date.

Mohawk Industries and E-Discovery: An Update

BY RONALD J. HEDGES AND JEANE A. THOMAS

In *Mohawk Industries Inc. v. Carpenter*, 130 Sup. Ct. 599, 2009 U.S. Lexis 8942 (Dec. 8, 2009), the U.S. Supreme Court addressed "whether disclosure orders adverse to the attorney-client privilege qualify for immediate appeal under the collateral order doctrine." The implications of the court's answer to that question for discovery in general and discovery of electronically stored information (ESI) in particular are becoming clearer as additional circuits confront the issues.

Background. The relevant facts are straightforward. Norman Carpenter was employed by Mohawk Industries. Allegedly, Carpenter advised Mohawk that it was employing illegal aliens. Unknown to Carpenter, Mohawk was embroiled in class action litigation where that allegation was central. Refusing to recant his testimony after a meeting with Mohawk's class action counsel, Carpenter was fired.

Meanwhile, the class action plaintiffs pursued discovery based on Carpenter's allegation. In defense, Mohawk revealed the "true facts" about Carpenter's discharge.

The district court found that the information sought by Carpenter was privileged, but that Mohawk had waived the privilege by its conduct in the class action. The court stayed its ruling to give Mohawk an opportunity to seek appellate review.

The Eleventh Circuit Court of Appeals rejected Mohawk's mandamus petition and dismissed its notice of appeal, concluding that the district court's order was not immediately appealable as a "collateral order" un-

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der *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

Writing for the court, Justice Sonia Sotomayor held that the collateral order doctrine was unavailable. She explained *Cohen* represents an exception to the finality rule of 28 U.S.C. Sec. 1291, and that exception is an extremely narrow one to the overriding policy against piecemeal appeals and encroaching on the prerogatives of district courts.

Importantly for our purposes, Sotomayor rejected Mohawk's argument that the privilege waiver order at issue was distinct from "run-of-the-mill discovery orders," although she recognized the importance of the attorney-client privilege. In so doing, she denied the existence of any discernible chill on the exercise of the privilege, concluding that "clients and counsel are unlikely to focus on the remote prospect of an erroneous disclosure order, let alone on the timing of a possible appeal."

Post-*Mohawk* Circuit Decisions: Ninth Circuit. A quick, non-exhaustive survey of decisions rendered after January 2010 indicates that several Courts of Appeals have considered the impact of *Mohawk Industries*.

In *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. Dec. 11, 2009), the grant granted a mandamus petition and directed the district court to issue a protective order to prevent discouraging the exercise of First Amendment "associational rights." Noting that, after *Mohawk Industries*, "it is uncertain whether the collateral order doctrine applies to discovery orders denying claims of First Amendment privilege," the Ninth Circuit relied on mandamus to review the lower court's rulings compelling the production of internal campaign communications.

In *Hernandez v. Tanninen*, 604 F.3d 1095 (9th Cir. May 12, 2010), another Ninth Circuit panel recognized that , "[t]he reasoning of *Mohawk*, which eliminated collateral order jurisdiction on appeals of disclosure orders adverse to the attorney-client privilege, applies likewise to appeals of disclosure orders adverse to the attorney work product privilege." The panel granted mandamus relief, having, inter alia, reviewed the district court's finding of a blanket waiver of privilege and work product and having concluded that such a waiver was "clear error." *See In re United States*, 590 F.3d 1305 (Fed. Cir. Dec. 30, 2009) (citing to *Mohawk Industries* and denying mandamus relief sought by United States to challenge trial court order compelling discovery of communications between United States and its attorneys on ground of fiduciary exception to privilege).

Fourth Circuit. Our informal research identified other appellate decisions worthy of note, including *United States v. Myers*, 593 F.3d 338 (4th Cir. Jan. 28, 2010). In *Myers*, an attorney appealed from a civil contempt order entered after she failed to produce certain items in response to grand jury subpoenas. Applying *Mohawk Industries*, the Fourth Circuit concluded that the collateral order doctrine was not available as a jurisdictional ground: "Even though Myers [the attorney] has appealed a civil contempt order arising from a discovery order rather than the underlying discovery order itself, *Mohawk* clearly controls our decision." The court noted that the "avenues" of appeal available to the attorney: she could seek interlocutory relief under 28 U.S.C. Sec. 1292(b), request mandamus relief, incur sanctions under Fed. R. Civ. P. 37(b)(2), or be held in criminal contempt.

Second Circuit. Finally, mention should be made of *In re Zyprexa Prod. Liability Litig.*, 594 F.3d 113 (2d Cir. Feb. 3, 2010) (*per curiam*). At issue was whether an attorney could appeal district court orders that compelled the attorney to comply with compensation protocols and enjoined him from making disbursements from a settlement fund. The Second Circuit held that it did not have jurisdiction under 28 U.S.C. Sec. 1292(a)(1), as the injunction in issue did not "give or aid in giving substantive relief." A majority of the panel also declined to use "the extraordinary means of an advisory mandamus order" to address the protocols established by the district judge in this MDL proceeding.

Earlier Guidance Still Obtains. Do the post-*Mohawk Industries* cases leave attorneys and clients who must deal with the consequences of discovery orders with any new avenues of potential relief? The approaches that we originally suggested continue to merit consideration:

- First, when a discovery order compels the disclosure of sensitive material, the disclosing party could seek a protective order under Fed. R. Civ. P. 26(c) to limit the scope of the disclosure to parties.
- Second, when the order is premised on the intentional disclosure of otherwise privileged material, the disclosing party could do its utmost to limit the scope of waiver pursuant to Fed. R. Evid. 502(a).
- Third, and again when the order compels the disclosure of otherwise privileged materials, the producing party could seek a nonwaiver order under Fed. R. Evid. 502(d).

Of course, these avenues are premised on a district court's willingness to extend some level of protection to materials which the court has already decided are entitled to none.

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COMPLEX LITIGATION & *E-Discovery*

Rule 26(f): The Most Important E-Discovery Rule

A means to communicate disputes to federal judges for early resolution

By Ronald J. Hedges

Time for a pop quiz. Can you name the most important of the so-called "e-discovery" amendments to the Federal Rules of Civil Procedure adopted in 2006? Candidates include, among others, Rule 26(b)(2)(B), which introduced the concept of "not reasonably accessible" electronically stored information ("ESI"), Rule 26(b)(5)(B), which established a uniform procedure among the United States district courts to assert claims of inadvertent production, Rule 34(b), which addressed form of production of ESI, and Rule 37(e), which purported to create a "safe harbor" from sanctions for loss of ESI under certain circumstances.

The correct answer: Rule 26(f), which expanded on the concept of "meet and confer" to include ESI.

Rule 26(f) first appeared in 1980. At that time, it was intended to deter abuse of the discovery process: "[C]ounsel who has attempted without success to effect with opposing counsel a reasonable program or plan for discovery is entitled to the assistance of the court." See Advisory Committee Note to 1980 Amendment of Rule 26(f). The procedure envisioned by this first incarnation of the rule was used only sparingly. See Advisory Committee Note to 1993 Amendment of Rule 26(f).

In 1993, Rule 26(f) was amended to, more or less, its current form. The 1993 amendment provided that, unless exempted by local rule or order, parties meet in person, discuss specific matters, and submit their discovery proposals to the court. The 1993 amendment went hand-in-hand with the "greater need for early judicial involvement to consider the scope and timing of the disclosure requirements of Rule 26(a) and the presumptive limits on discovery imposed under these rules [the Federal Rules of Civil Procedure] or by local rules." The 1993 amendment paralleled the amendment of Rule 16, which was intended to "highlight the court's powers regarding the discovery process."

The year 2000 saw the elimination of the "in person" requirement:

"There are important benefits to face-to-face discussion of the topics to be covered in the conference, and those benefits may be lost if other means of conferring were routinely used when face-to-face meetings would not impose burdens. Nevertheless, geographic conditions ... may exact costs far out of proportion to these benefits." See Advisory Committee Note to 2000 Amendment of Rule 26(f)].

The year 2000 also saw, in general terms, the elimination of local exemption from the Rule 26(f) process. Since 2000, Rule 26(f) and its duty to "meet-and-confer" has become a cornerstone of the federal civil litigation process. (Parenthetically, Rule 37(a)(1) imposes an analogous duty before discovery motions may be made.)

In 2006, Rule 26(f) was again amended, this time to highlight the need for parties to consider electronic discovery. Issues added for discussion at the meet-and-confer were disclosure or discovery of ESI, including form of production; and claims of privilege or work product protection, including reaching agreement on nonwaiver and incorporating such agreements in orders.

Rule 26(f) has been "supplemented" by local rules that themselves address electronic discovery. The Local Civil Rules of the District of New Jersey exemplify this supplementation. For example, Local Civil Rule 26.1(d)(3) requires parties to consider, among other things, restoration of data and cost-bearing. The scope of this local rule is dwarfed by those of other United States district courts, some of which might be deemed to impose onerous obligations on parties. See, e.g., R.J. Hedges, "Discovery of Electronically Stored Information: Surveying the Legal Landscape" at 24 (*BNA:* 2007).

Why is Rule 26(f) — as supplemented by local rule — the most important e-discovery rule? Quite simply, it gives the parties an opportunity to reach agreement on the "contours" of the civil litigation in which they are engaged and, just as importantly, agree on what they disagree about and present their disputes for early judicial resolution, perhaps even at the Rule 16(b) initial scheduling conference. Unfortunately, "[a]ll too often, attorneys view their obligation to "meet

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and confer" ... as a perfunctory exercise. When ESI is involved, judges should insist that a meaningful Rule 26(f) conference take place and that a meaningful discovery plan be submitted." See B.J. Rothstein, R.J. Hedges, & E.C. Wiggins, "Managing Discovery of Electronic Information: A Pocket Guide for Judges" at 4 (Federal Judicial Center: 2007). Indeed, a United States Magistrate Judge well-known for his writings on e-discovery once cautioned parties that he would require them to conduct a meet-and-confer in his presence if they could not "play nice" and attempt to resolve a dispute between themselves. *Peskoff v. Faber*, 244 F.R.D. 54 (D.D.C. 2008).

What, in the world of electronic discovery, can attorneys attempt to agree on at the meet-and-confer? Matters include:

- the definition of relevant ESI;
- the scope (both "temporal" and "geographic") of preservation of relevant ESI;
- the identification of the custodians of relevant ESI;
- the manner in which relevant ESI will be collected;
- the manner in which relevant ESI will be processed;
- the search methodology to be employed in processing;
- the form in which relevant ESI is to be produced;
- the use of so-called "clawback" or "quick peek" agreements;
- the use of nonwaiver orders under Rule 502 of the Federal Rules of Evidence should the presiding judge entertain such orders in a given litigation;
- cost sharing; and
- the admissibility of ESI on motions and at trial.

Reaching agreement on these and related matters — or securing early judicial resolution of disagreement on any matter — will enable parties to sequence or phase discovery, reduce the cost and delay associated with motion practice (especially in the District of New Jersey, where magistrate judges entertain informal discovery applications), and secure the prompt resolution of litigation.

It should also be recognized that, in any complex civil litigation, but especially one where large volumes of ESI may be implicated, the Rule 26(f) meet-and-confer may be an iterative process. In other words, a single session may be inadequate. Parties may need to do "homework" to answer questions posed and may need to reconvene at a later date to continue the meet-and-confer process. Moreover, successful meet-and-confers may, in appropriate circumstances, require the presence of consultants to assist in understanding, for example, what search methodologies may do. All this is not intended to discourage parties or counsel. Instead, the nature of the Rule 26(f) conference should be understood from the outset.

Rule 1 of the Federal Rules of Civil Procedure states that, "[t]hey should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." If that is so, how has the bench and bar come to the point where civil litigation, especially complex civil litigation, is often perceived as mired in cost and delay associated with electronic discovery? There is no simple answer. The cost associated with privilege review is often cited. So-called "satellite discovery," which sees parties doing battle about the procedures used to conduct discovery rather than engaging in "merits" discovery, is also cited, as are well-publicized decisions which impose sanction on parties for spoliation of evidence.

Perhaps it comes down to who we are. We are trained to be advocates. Advocacy breeds adversity. Or does it?

"Lawyers have twin duties of loyalty: While they are retained to be zealous advocates for their clients, they bear a professional obligation to conduct discovery in a diligent and candid manner. Their combined duty is to strive in the best interests of their clients to achieve the best results at a reasonable cost, with integrity and candor as officers of the court. Cooperation does not conflict with the advancement of their clients' interests — it enhances it. Only when lawyers confuse advocacy with adversarial conduct do these twin duties of loyalty present a conflict." [The Sedona Conference Cooperation Proclamation at 1 (The Sedona Conference: 2008).]

Where does this leave us? Cooperation and advocacy are complementary and are the central features of the American system of civil justice. Rule 26(f), in essence, "squares the circle" between the two. Rule 26(f) encourages parties to reach agreement when warranted and also recognizes that parties will not always do so. It provides a means to communicate disputes to federal judges for early resolution. This balancing of the duties of counsel to their clients, their adversaries, and the courts is central to cost-effective and prompt resolution of civil litigation. ■

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Pension Committee Revisited

One Year Later

A Retrospective on the Impact of Judge Scheindlin's Influential Opinion

Edited by Brad Harris and Ron Hedges

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